SHIPPING ACT OF 1981

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MERCHANT MARINE

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1593

TO REVISE REGULATION OF INTERNATIONAL LINER SHIPPING OPERATING IN THE UNITED STATES FOREIGN COMMERCE

AND

S. 125

TO REVISE AND CODIFY THE SHIPPING ACT, 1916, AND RELATED LAWS

SEPTEMBER 21, 23, AND 24

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SHIPPING ACT OF 1981

MONDAY, SEPTEMBER 21, 1981

U.S. SENATE, COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, SUBCOMMITTEE ON MERCHANT MARINE,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 235 of the Russell Senate Office Building, Hon. Slade Gorton (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. The committee will come to order. This morning we will hear testimony and discuss two pending bills, S. 1593 and S. 125, both designed to rewrite the Shipping Act of 1916 and to modernize U.S. regulation of international liner shipping.

For many here today, there must be a sense of déjà vu, although there are a few new faces. The central issue before us, how to clarify the antitrust immunity extended by the 1916 act to liner vessel operators in the foreign trades, has been much debated, especially during the past several years. Among members of the maritime community, there is a consensus that we are behind the times and out of sync with our trading partners; that, in short, revision of the 1916 act is long overdue and that any revision must focus on the unpredictability, the international friction, and the delay that our current regulatory scheme has produced.

During the 96th Congress the Senate held extensive hearings on three bills introduced by Senator Inouye, S. 1460, S. 1462, and S. 1463, and later considered and passed the progeny of these bills, S. 2585. That bill has been reintroduced and is before us as S. 125.

The House of Representatives also held extensive hearings on its omnibus maritime bills, of which title II addressed the same regulatory issues. Complex circumstances prohibited enactment of these prior proposals but has not diminished our resolve to restate the intent of Congress in new maritime regulatory legislation.

This history is important, because it illustrates the strong foundation from which we attempt this year to construct a new regulatory structure. For his persistent efforts in this vein, my colleague, Senator Inouye deserves much credit. I have learned quite a bit about our foreign shipping trade since I arrived in Washington, not the least from him, and expect in earnest to learn more during these hearings.

At the outset, however, I would like to reflect on where we start. Last year's experience, I believe, teaches two essential lessons. First, we must distinguish regulatory from promotional issues in revamping our maritime policy, and we must solve our regulatory problems first, in order to provide as clear and as effective and as competitive a regulatory environment as possible. Only then, should we consider fully what promotional efforts are necessary.

The second lesson is that we need a unified and definitive administration position. It does this committee little good to mark up a bill that cannot pass the Congress. Moreover, it does Congress no good to pass a bill that will be administered in as divisive and confusing a manner as the present act has been. Recent events, however, should justify greater optimism. The Reagan administration has displayed great success at decisive policymaking. The Maritime Administration has been transferred to the Department of Transportation to permit greater coordination of this country's transportation policies. The Secretary of Transportation has been designated by the President as his maritime spokesman, and Drew Lewis has proved to be an effective leader within the administration. I am admittedly disappointed that Secretary Lewis has been unable to secure a firm administration position in time for this morning's hearings, but I am in no way discouraged about his ability to do so soon. I am confident that a supportive position will be taken by the administration, and I anxiously await its presentation.

Rather than explain my bill at this point, I will include in the record after my remarks, the statement I made before the Senate in introducing S. 1593. Nevertheless, it is worthwhile to highlight the basic motives for moving this bill soon. We need a clear regulatory framework with authority delegated to a single regulatory agency to administer the law in an expeditious and predictable manner. We need a regulatory scheme that honors the integrity of our trading partners and achieves greater harmony in an international trade. We need to remove the severe antitrust handicap under which U.S. liner companies operate and generally ease Federal regulations where commercial mechanisms adequately restrain abuses of market power. And we need to stimulate our import-export trades by permitting operators to reduce overcapacity through rationalized services and by encouraging competitive pricing of transportation services to shippers.

At the core of S. 1593 is a clear, predictable antitrust immunity. Many other issues arise in these bills on which I expect considerable debate during the course of this week. This debate may lead to substantial modifications of this bill, but I fully intend to see it passed into law.

I look forward to working with all who come before the committee and with my Senate and House colleagues, and trust that a cooperative atmosphere will lead to successful clarification of our liner shipping policy.

[The statement and bills follow:]

SHIPPING ACT OF 1981

Mr. GORTON. Mr. President, the bill I am introducing will revise the Shipping Act of 1916 to clarify the purposes of United States regulation of international liner shipping in the U.S. foreign trade. This bill simplifies the process by which liner conference activities are sanctioned in the U.S. foreign trade and attempts to strengthen the conference system as a method of insuring stability in that trade.

Similar legislation was introduced last Congress in both the Senate and the House but was not enacted. I believe it is essential that we now proceed to enact legislation to revise the regulatory policies in the Shipping Act of 1916. It cannot be underestimated that this will be a necessary part of any new approach to revitalizing the maritime industry, as Secretary Lewis has noted in the letter I am submitting for the Record.

Perhaps not enough people are aware that the merchant marine of the United States faces serious problems and is now at one of its historic low points in the percentage of the cargoes that it carries. Past Government solutions have not been notably successful in arresting this downward trend. It is no longer sufficient to pass slogans about the importance of the merchant marine for national security to trigger a commitment of unlimited dollars. We must do better with changes and promotional activities that do not directly create expenditures from the Federal Government. In this vein, the administration is now undertaking a comprehensive review of maritime policy.

Nevertheless, it has seemed more and more apparent to me that martime regulatory reform is needed now. The process of beginning to discuss regulatory changes should not await a thorough determination of maritime policy by the administration in promotional and other areas. Regulatory reforms can also go forward without concern for direct fiscal impact. The measures taken in this bill can bring immediate benefits to not only U.S.-flag carriers but also to foreign-flag carriers serving the U.S. foreign trade. U.S. exporters and importers, who rely on efficient and regular services and stable rates, will also benefit.

Before describing the bill, I would like to emphasize that it is intended as a serious vehicle for discussion. Hearings before the Merchant Marine Subcommittee will be scheduled for the week of September 14 through 18. I intend to be receptive to all comments from U.S. and foreign maritime interests and from our importers and exporters. I understand that a bill is being introduced in the House of Representatives tomorrow that, though more modest in scope, is similarly aimed. I am hopeful that a cooperative climate will lead to consensus between the House and the Senate, producing the best maritime regulatory bill possible.

The Shipping Act of 1916 was originally designed to recognize the validity of the conference system and to insulate it from the antitrust laws of the United States. But that policy has, for all practical purposes, been stood on its head by a series of decisions of the Supreme Court of the United States in the course of the last 15 years. The Court has expanded the exposure of the liner shipping industry to charges of violating the antitrust laws. This has limited the flexibility of the conference system and, not at all incidentally, has simply outraged our international trading partners, who do not in any respect agree with either the extraterritorial application of our antitrust laws or with the theory of our antitrust laws as they relate to international commerce.

The motivation for any legislation to revise the Shipping Act must focus on the need to restore the intent of Congress in this area. I believe, however, that the Congress should, in undertaking this task, go much further and recodify the entire Shipping Act. We need a simplified, more efficient, responsive, and effective regulatory scheme for international liner shipping in our foreign trade. We need to reduce Government regulation where it represents a wasteful interference in commercial maritime transactions. We need to inject commercial standards and market mechanisms into every facet of our liner shipping a policy to the extent that they will work as well or better than direct regulation. And we need precisely to define this policy. In this manner, the revised law itself can outline in a clear, single voice this Nation's maritime regulatory policy.

This bill sets forth a declaration of policy to aid in its future interpretation. These policy objectives focus on facilitating U.S. foreign commerce by encouraging a competitive and efficient ocean transportation system through commercial means and with a minimum of government involvement. Many of the changes to be accomplished by this bill can be understood best by referring to this policy statement.

It is questionable that the FMC's activity to date has contributed significantly to an effective international transportation system. For this reason, and consistent with the President's goal to reduce unnecessary Federal regulation, this bill allows commercial standards and practices to govern in many areas where the FMC now has considerable discretion. Fundamental to the policies stated in the bill is the recognition that the conference system is an acceptable method of commercial operation in international shipping. It will be the policy of the United States to permit cooperation among carrirs and the bill will permit them to rationalize their services. This policy would permit carriers to offer the highest quality of service to shippers and consignees at the lowest possible stable freight rates. At the same time the bill reaffirms the duty of the liner carrier to act as a common carrier responsive to the needs of exporters and importers in the waterborne commerce of the United States. It therefore reaffirms strong protection of shippers against discriminatory, prejudicial, unfair, or deceptive practices. The bill also seeks evenhanded regulation of U.S.- and foreign-flag carriers as well as evenhanded enforcement.

At the bill's core is a grant of complete antitrust immunity to conference activities. This is not only consistent with international shipping practice but would also remove a constant irritant between the United States and our foreign trading partners. It would restore the pre-Carnation case view that agreements for economic cooperation among carriers are considered to be subject exclusively to the Shipping Act, and not to other antitrust laws.

A full appreciation of this clarification requires an understanding of the chilling effect that antitrust laws have had on international liner shipping operations. Application of the antitrust laws has brought uncertainty to many operator decisions. Because they are subject to criminal penalties and treble damages they are often afraid of their own shadows. They are reluctant to cooperate in ways which would be protected even by the limited antitrust exemption offered by the FMC for fear that the margins of that exemption are unclear and that the Justice Department might still attack them.

In short, they are afraid to act in exactly the manner that the Shipping Act contemplates they should be able to act. For these reasons, the advantages of a conference in assuring stability and efficiency have not been fully achieved. This bill would permit the kind of rationalizing efficiencies that conferences are designed to accomplish.

Clear antitrust immunity is also a major step in revitalizing our maritime industry because it removes a significant handicap created by uneven enforcement. U.S.-flag carriers domiciled in this country are disadvantaged in meeting foreign-flag competition by strong domestic enforcement of antitrust laws which seldom can be effectively enforced against carriers domiciled overseas. Foreign carriers can make arrangements or concessions to improve their competitive position, often by providing shippers outside of the United States with benefits on routes other than those to or from the United States.

Antitrust laws inhibiting rationalization of sailings or the formation of joint services by U.S.-flag carriers affect their ability to meet the service frequency of foreign consortia of liner operators which can form such alliances. Potential pricing and cost benefits through the economics of rationalized or joint services are not readily available to U.S.-flag carriers. Antitrust immunity may go far in permitting U.S. carriers to compete on equal terms witn their foreign competitors.

The bill thus overrules the Carnation and Sabre decisions and insures that violators of the Shipping Act will be subject only to civil penalties provided in the new Shipping Act itself. My bill thus strips away the most rigorous layer of regulation—the antitrust laws—and the most severe penalty—treble damages.

The bill also provides for several new applications of the antitrust immunity. Conferences will be granted antitrust immunity to enter into intermodal transportation arrangements with air, motor, and rail carriers for the transportation of cargo under intermodal through-rates. Increasingly, in an an era of advancing intermodal technology, liners have published their own intermodal tariffs for point-to-point rather than merely port-to-port services.

Similarly, conferences have filed agreements and tariffs setting intermodal through-rates The FMC has exercised its jurisdiction over oceanborne foreign commerce to approve such intermodal arrangements. Yet the Department of Justice is currently challenging the Commission's statutory authority to extend antitrust immunity to these arrangements. Because conference authority to set intermodal through-rates has been in doubt, there has been an increasing diversion of cargo from and to the United States through Canadian ports by foreign-flag carriers.

This cargo has been attracted by lower through freight rates covering the combined inland and ocean movements. These rates have not been subject to the tariff filing requirements imposed on both U.S.-flag and foreign-flag carriers on shipments loaded and discharged at U.S. ports. U.S. shippers strongly favor these single factor point-to-point rates covering combined inland and ocean movements. U.S. carriers are most competitive in high technology services that facilitate intermodal transportation. My bill clearly grants conferences antitrust immunity to fix uniform rates and conditions for intermodal transportation.

I believe this is consistent with the underlying conclusion that conferences are the best means of achieving trade stability in our foreign commerce. To deny the conference system this flexibility would be to freeze them into the transportation methods of yesterday and to deprive and increasingly large share of our cargoes from stable transportation service through U.S. ports.

I also propose to offer antitrust immunity for the formation of shippers' councils. This will allow U.S. exporters and importers to form councils for mutual consultation with carrier conferences on services and general rates. The intent is to permit shippers to cooperate in assuring a more responsive attitude by carriers and conferences, I do intend to listen closely to conflicting views on whether this proposal is in the public interest. Many point to the European model as an effective vehicle for constructive cooperation. Others question its value. Many shippers opposed the organizations or are ambivalent. It is difficult to tell what these councils will look like or how they will act, so I hope to hear more specific content.

The general direction of my bill on conference organization will be that so long as it does not discriminate against or act detrimentally to our foreign commerce, conferences can structure themselves as their members choose. Thus, for example, I believe closed conferences should be permitted. I expect to hear debate on this issue, and, partly because of that, my inclination is that Government should not dictate a single solution.

The same attitude applies to whether or not the law should mandate that every conference permit its carriers to exercise independent rate action. This highly controversial issue is complicated and divisive. If conferences are the best means of achieving long-term trade stability, independent action may weaken the conference and serve purposes inconsistent with the bill. I also wonder whether such action could be used to discriminate among shippers or to avoid loyalty contract restrictions and obligations. U.S.-flag carriers are strongly divided along east-west versus north-south trade route lines.

I therefore question the wisdom of legislating a uniform requirement that does not satisfy the interests of all trades and conferences. This issue seems to me to be one for negotiation within a conference among its members.

The approval process I propose departs from last year's Senate and House proposals in the choice of substantive standards for approval but is consistent with the 1916 act. Last year's Senate declaration of policy is too flexible, directionless, and amorphous to give sound guidance or to insure predictable results. The House proposal also lacked clarity. It called for disapproval of those agreements that violate any provision of the bill. This is too open-ended, especially since most of the proscriptions in the bill address conduct, leaving this a mere requirement that the agreement be procedurally correct. I would recommend retention of the two original criteria from section 15 before it was amended in 1961 to include the public interest test. That is, an agreement could be disapproved only if it is: First, unjustly discriminatory or unfair between carriers, shippers, exporters or ports or between exporters from the United States and their foreign competitors, or second, detrimental to the commerce of the United States. Without the vague public interest test, the Svenska standard would have no application, yet the criteria would be relatively clear. The process would be similar to that currently in operation but with time limits to insure that the Federal Maritime Commission consider all agreements expeditiously. The burden of proof would also clearly lie with the person opposing an agreement.

On most other issues, my bill follows last year's House bill because I believe it incorporated changes necessary to simplify the legislative language, to reduce Government participation in decisions which industry can fairly make, and by introducing requirements that make commercial sense. I will discuss some of these points briefly.

Tariff filing requirements are retained. Liner operators will still be prevented from charging less than the published rates in their tariffs, in order to insure they act as common carriers without discrimination among shippers. This fair competition mandate applies reciprocally both to carriers and to shippers and supports the theory of the conference system that a common tariff can neutralize, to a large extent, the prospect of predatory economic competition between serving a given trade and thus insure stable rates.

Loyalty contracts could include dual rates or a series of rate spreads providing lower rates in turn for shipper loyalty, limited to an aggregate 15 percent differential. This can be an important tool for achieving trade stability. The bill avoids the need to submit each loyalty contract for Commission approval.

Independent neutral-body policing would also be required since it can be an effective companion to FMC policing and thus would reduce the need to have a large force of Government personnel. Moreover, a neutral body is less likely to be stymied by foreign blocking statutes because it is created through commercial negotiation of carriers from the interested nations. I am open to the suggestion that independents also should be required to engage a neutral body and that there should be a common neutral body for all in a trade. I am not yet convinced that this is necessary, though, so my bill extends the requirement only to conference members.

With respect to regulations affecting freight forwarders, the bill eliminates licensing requirements, while retaining certain safeguards to see that freight forwarders are economically stable and will not act as conduits for illegal rebates.

The bill would include the controlled carrier provisions adopted by Congress in 1978, a clear list of prohibited activities, and a clearly defined set of guidelines and requirements for Commission proceedings leading to damage awards or penalties. Further provisions authorize the Commission to identify certain types of agreement for exemption from the requirements of the act. This provision permits flexibility to reduce unnecessary burdens such as may now exist for ports or terminal operators.

Finally, a few comments on what my bill does not contain. It does not contain language calling for substantial carriage of cargo on U.S-flag vessels. While I am sympathetic to this goal, it is patently inconsistent with the concept of regulatory policy in international commerce. It is worth noting again that the clear antitrust immunity in this bill will remove a handicap to U.S-flag carriers and this should help revitalize the U.S.-flag fleet. The bill should not become a vehicle for affirmative promotion. Our trade relies on a fleet of vessels flying under many different flags. The bill also does not include criteria for negotiating intergovernmental maritime agreements. These are not within the province of our regulatory policy or the FMC. A solution to this issue should await an administration position on bilaterals.

I am hopeful this bill, if enacted, will stimulate the liner shipping industry as well as our import-export trade. I believe it will harmonize our laws with those of our trading partners within the framework of our broader commercial policies. I also believe it would be a significant step in our broader effort to redefine our Nation's maritime policy.

II

97TH CONGRESS
1ST SESSION

S. 1593

To revise regulation of international liner shipping operating in the United States foreign commerce.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JULY 8), 1981

Mr. GORTON (for himself, Mr. STEVENS, Mr. KASTEN, and Mr. INOUYE) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To revise regulation of international liner shipping operating in the United States foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Shipping Act of 1981".

SEC. 2. DECLARATION OF POLICY.

The objectives of United States regulation of international liner shipping are—

(1) to develop and maintain an efficient ocean transportation system through commercial means, with

★(Star Print)

a minimum government involvement, in order to serve the needs of United States foreign commerce;

(2) to foster reliable and responsible service by ocean common carriers and conferences;

(3) to assure ocean transportation rates and practices for United States exporters and importers that are internationally competitive, and which are not unjustly discriminatory;

(4) to harmonize United States shipping practices with those of its major trading partners;

(5) to permit cooperation among carriers and rationalization of services; and

(6) to facilitate efficient and timely regulation by a single Federal agency of the various aspects of international liner shipping, responsive to the growth of ocean commerce and international developments affecting that commerce.

SEC. 3. DEFINITIONS.

As used in this Act—

(1) "agreement" means understandings, arrangements and associations, written or oral, and any modification or cancellation thereof;

(2) "antitrust laws" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended;

the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548), as amended; and amendments and Acts supplementary thereto;

(3) "bulk cargo" means—

(A) cargo that is loaded and carried in bulk without mark or count; and

(B) cargo commonly termed "neo-bulk", such as forest products in an unfinished or semifinished state, which requires specialized handling and is moved in lot sizes which range from being too large for containers up to, and including, shipload lot sizes;

(4) "Commission" means the Federal Maritime Commission;

(5) "common carrier" means a person, whether or not actually operating a vessel, who holds himself out to engage in transportation by water for hire as a public employment and undertakes to carry for shippers indifferently;

(6) "conference" means an association of ocean common carriers which provides ocean transportation on a particular route or routes and which operates

within the framework of an agreement establishing rates and any other conditions of service;

(7) "controlled carrier" means any ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by the government under whose registry the vessels of such carrier operate. Ownership or control by a government shall be deemed to exist with respect to any carrier if—

(A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the carrier;

(8) "deferred rebate" means a return, by an ocean common carrier, of any portion of the freight money to any shipper as a consideration for that shipper giving all, or any portion, of his shipments to that or any other ocean common carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and

the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement;

(9) "fighting ship" means a vessel used in a particular trade by an ocean common carrier or group of such carriers for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of such trade;

(10) "loyalty contract" means a contract with an ocean common carrier or conference by which a contract shipper obtains lower rates by committing all or a fixed portion of its cargo to such carrier or conference;

(11) "non-vessel-operating common carrier" means a common carrier by water that does not operate the vessels by which the ocean transportation service is provided. A non-vessel-operating common carrier is a shipper in his relationship with ocean common carriers;

(12) "ocean common carrier" means a vessel-operating common carrier, except ferry boats and ocean tramps, engaged in the transportation by water of passengers or cargo between the United States and a foreign country, whether in the import or export trade;

(13) "other person subject to this Act" means any person engaged in the business of consolidating, freight forwarding, or furnishing wharfage, dock, warehouse,

or other terminal facilities in connection with an ocean common carrier;

(14) "ocean freight forwarder" means a person in the United States who—

(A) dispatches shipments via ocean common carriers; and

(B) processes the documentation or performs related activities incident to such shipments;

(15) "person" includes individuals, corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or of any State, territory, district, or possession thereof, or of any foreign country;

(16) "rates" means charges, classifications, rules, or regulations that have a direct impact on a shipper's ocean transportation costs;

(17) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made;

(18) "shippers' council" means an association of shippers or their agents, other than ocean freight forwarders and non-vessel-operating common carriers;

(19) "surcharge" means any temporary change in rates that is necessary to cover a sudden or extraordi-

nary change incurred by an ocean common carrier or conference with respect to its costs or revenues;

(20) "tariff" means any schedule of rates pertaining to ocean transportation, including any supplement, amendment or reissue;

(21) "through intermodal rate" means the single amount charged by an ocean common carrier in connection with through transportation;

(22) "through transportation" means transportation by two of more carriers at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port;

(23) "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

SEC. 4. AUTHORIZED ACTIVITIES.

(a) CONFERENCE ACTIVITIES.—Ocean common carriers or other persons subject to this Act may agree to—

(1) discuss, fix, regulate, and agree upon rates, surcharges, accommodations and other conditions of services;

(2) pool or apportion earnings, losses, or traffic;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements;

(6) enter into other agreements to control, regulate, or prevent competition among themselves; and

(7) limit, in the case of conferences, membership.

(b) INTERMODAL ACTIVITIES.—Ocean common carriers or other persons subject to this Act may agree with each other or with any combination of air carriers, rail carriers, motor carriers, or other common carriers by water to—

(1) establish through transportation routes for the movement of cargo; and

(2) establish through intermodal rates, or concur in tariffs.

(c) SHIPPERS' COUNCIL ACTIVITIES.—Shippers who are members of a shippers' council organized or existing under the laws of the United States may—

(1) mutually consult and exchange information or views regarding general rate levels, rules, practices, or services;

(2) agree upon common positions; and

(3) consult and negotiate with any ocean common carrier or conference regarding general rate levels, rules, practices, or services.

SEC. 5. AGREEMENTS.

(a) In General.—No concerted activity authorized by section 4 shall be permitted under this Act except pursuant to an agreement that has become effective under section 6.

(b) Filing Requirements.—A true copy of every agreement entered into with respect to any activity described in section 4 shall be filed with the Commission. In the case of oral agreements, complete memoranda specifying in detail the substance of such agreements shall be filed. Within 10 working days of receipt, the Commission shall transmit a notice of filing to the Federal Register for publication.

(c) Conference Agreements.—Every conference must—

(1) provide that any limitation on membership is based on commercially reasonable criteria;

(2) permit any member to withdraw from membership upon reasonable notice without penalty;

(3) engage the services of an independent neutral body to police fully the obligations of the conference and its members;

(4) provide the right of independent action—

(A) in any agreement between carriers not members of the same conference, for each carrier, and, in any agreement between conferences serving different trades that would otherwise be naturally competitive, for each conference; or

(B) in any intermodal agreement, for air carriers, rail carriers, motor carriers, or common carriers by water not subject to this Act to establish their portion of through intermodal rates or to establish rules and regulations that apply exclusively to the services performed by such carriers.

(5) provide for a consultation process designed to insure—

(A) commercial resolution of disputes;

(B) cooperation in preventing malpractice;

(C) procedures for promptly and fairly considering shippers' requests and complaints; and

(D) regular and orderly communication and exchange of information with shippers and shippers' councils in their trade.

(d) SHIPPERS' COUNCIL AGREEMENTS.—Every shippers' council must—

(1) limit membership to those shippers that have a direct financial interest in the export or import of the commodities covered by the agreement;

(2) provide that membership is voluntary;

(3) provide that the members have the right to act independently with any carrier or conference;

(4) provide for a consultation process designed to insure—

(A) commercial resolution of disputes;

(B) cooperation in preventing malpractice;

(C) regular and orderly communication and exchange of information with conferences in their trade.

SEC. 6. ACTION ON AGREEMENTS.

(a) REJECTION BY THE COMMISSION.—Any agreement that does not conform to the requirements of section 5 shall be rejected by the Commission.

(b) STANDARDS.—The Commission shall by order, after notice and hearing, disapprove or modify any agreement that it finds—

(1) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; or

(2) to operate to the detriment of the commerce of the United States.

The Commission shall approve all other agreements.

(c) BURDEN OF PROOF.—The burden of proof in any proceeding under this section shall be on the party opposing the agreement.

(d) DURATION OF EFFECTIVENESS.—Agreements that are approved shall remain in effect until withdrawn, canceled, or modified. The Commission shall not on its own motion limit the duration of an agreement's effectiveness.

(e) FINAL DECISION-TIME.—The Commission shall issue a final decision on any agreement within 180 days after filing with the Commission. For good cause the Commission may extend the time period once for not more than 90 days.

(f) DELAY.—If a final decision is not issued within the 180-day period referred to in subsection (b), or by the end of any extension period, the agreement shall go into effect as filed. If the Commission determines that it is unable to issue a final order within such period or extension due to willful delays directly attributable to either a proponent or a complainant, the Commission may disapprove the agreement, or permit it to become effective, solely on the basis of such delay.

(g) COMPLIANCE WITH SUBPENA OR DISCOVERY.—In any proceeding under this section, the Commission may disapprove any agreement for failure of a proponent of the agreement to comply with any subpena or discovery order lawfully issued by the Commission.

SEC. 7. LOYALTY CONTRACTS.

(a) CONTRACT REQUIREMENTS.—Any conference or ocean common carrier engaged in foreign commerce may utilize loyalty contracts, if each such contract meets the following requirements:

(1) The contract is available to all shippers on equal terms and conditions.

(2) The contract shipper is permitted prompt release from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide space requested on reasonable notice by the shipper.

(3) The contract provides that whenever a rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference, the rate—

(A) may not be increased on less than 90 days' notice, except upon agreement of the applicable shipper; and

(B) may be increased on not less than 30 days' notice if the increase is to a level no higher than that from which the particular rate was reduced within 180 days immediately preceding the filing of the increase, or if the increase is a surcharge.

(4) The contract covers only those goods of the contract shipper as to the shipment of which it has the legal right at the time of shipment to select the carrier. It shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid its

obligation under the contract, the contract shipper divests itself, or with the same intent permits itself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract. In any dispute under this paragraph the burden of proof shall be on the contract shipper.

(5) The contract shipper is not required to divert shipments of goods from natural routings not served by the carrier or conference where direct carriage is available.

(6) The damages recoverable for breach by either party are limited to actual damages to be determined after breach in accordance with the principles of contract law. The contract may specify, however, that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling.

(7) The contract shipper is permitted to terminate at some time without penalty upon 90 days' notice.

(8) The carrier or conference is permitted on 90 days' notice to terminate the contract rate system in whole or with respect to any commodity without penalty.

(9) The contract provides for a spread or series of spreads, to be commercially determined, between tariff rates and rates charged contract shippers that shall not exceed an aggregate of 15 per centum.

(10) The contract excludes bulk cargo.

(b) TREATMENT OF CONTRACT NOT IN CONFORMITY.—The utilization of a loyalty contract that is not in conformity with one or more of the requirements set forth in subsection (a) shall be treated as a violation of this Act.

SEC. 8. EXEMPTION FROM ANTITRUST LAWS.

(a) The antitrust laws shall not apply to—

(1) any agreement or activity described in section 4;

(2) any loyalty contract that conforms with the requirements of section 7, or any activity pursuant to that loyalty contract;

(3) any agreement or activity that relates solely to transportation services between foreign countries;

(4) any agreement or activity that relates to shippers' councils operating exclusively outside the United States; and

(5) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities exclusively outside the United States.

(b) This Act shall not be construed to extend antitrust immunity to air carriers, rail carriers, motor carriers, or common carriers by water not subject to this Act.

SEC. 9. TARIFFS.

(a) In General.—(1) Except with regard to bulk cargo, every ocean common carrier shall file with the Commission, and keep open to public inspection, tariffs showing all its rates between all points on its own route and on any through transportation route which has been established. Such tariffs shall plainly indicate the places between which cargo will be carried, list each classification of cargo in use, state separately each additional charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part or the aggregate of such rates or charges, and include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

(2) Copies of such tariffs shall be made available to any person and a reasonable charge may be assessed for them.

(b) Initial Rates and Rate Changes.—No initial rates or increases in existing rates shall become effective earlier than 30 days after filing with the Commission. Any change in the rates that results in a decreased cost to the shipper may become effective upon publication and filing with the Commission. The Commission, for good cause, may allow rate increases or surcharges to become effective in less than 30 days.

(c) REFUND OF CHARGES.—The Commission may permit an ocean common carrier or conference to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature due to inadvertence in failing to file a new tariff and that such refund will not result in discrimination among shippers, ports, or carriers. The application for refund must be filed with the Commission within 180 days from the date of shipment.

SEC. 10. CONTROLLED CARRIERS.

(a) CONTROLLED CARRIER RATES.—No controlled carrier subject to this section shall maintain rates in its tariffs filed with the Commission that are below a level that is just and reasonable. The Commission may, at any time after notice and hearing, disapprove any rate which the controlled carrier has failed to demonstrate to be just and reasonable. In any proceeding under this subsection, the burden of proof shall be on the controlled carrier to demonstrate that its rate is just and reasonable. Rates filed by a controlled carrier that have been rejected, suspended, or disapproved by the Commission are void, and their use is unlawful.

(b) RATE STANDARDS.—For the purpose of this section, in determining whether rates by a controlled carrier are just and reasonable, the Commission may take into account appropriate factors including, but not limited to, whether—

(1) the rates which have been filed are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade;

(2) the rates are the same as or similar to those filed or assessed by other carriers in the same trade;

(3) the rates are required to assure movement of particular cargo in the trade; or

(4) the rates are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

(c) EFFECTIVE DATE OF RATES.—The rates of controlled carriers shall not, without special permission of the Commission, become effective sooner than the thirtieth day after the date of filing with the Commission. After the date of the enactment of this section, each controlled carrier shall, upon the request of the Commission, file, within 20 days of request, with respect to its existing or proposed rates, a statement of justification that sufficiently details the controlled carrier's need and purpose for such rates, upon which the Commission may reasonably base its determination of the lawfulness thereof.

(d) DISAPPROVAL OF RATES.—Whenever the Commission is of the opinion that the rates, filed by a controlled carrier may be unjust and unreasonable, the Commission may issue an order to the controlled carrier to show cause why such rates should not be disapproved. Pending a determination as to their lawfulness in such a proceeding, the Commission may suspend such rates at any time before their effective date. In the case of rates that have already become effective, the Commission may, upon the issuance of an order to show cause, suspend such rates on not less than 60 days' notice to the controlled carrier. No period of suspension under this subsection may be greater than 180 days. Whenever the Commission has suspended any rate under this subsection, the affected carrier may file new rates to take effect immediately during the suspension period in lieu of the suspended rates; except that the Commission may reject such new rates if it is of the opinion that they are unjust and unreasonable.

(e) PRESIDENTIAL REVIEW.—Concurrently with the publication thereof, the Commission shall transmit to the President any order of suspension or final order of disapproval of rates of a controlled carrier subject to this section.

Within 10 days after the receipt or the effective date of such Commission order, whichever is later, the President may request the Commission in writing to stay the effect of the Commission's order if he finds that such stay is required for reasons of national defense or foreign policy which reasons shall be specified in the report. Notwithstanding any other provision of law, the Commission shall immediately grant such request by the issuance of an order in which the President's request shall be described. During any such stay, the President shall, whenever practicable, attempt to resolve the matter in controversy by negotiation with representatives of the applicable foreign governments.

(f) EXCEPTIONS.—The provisions of this section shall not apply to—

(1) any controlled carrier of a state whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment;

(2) any controlled carrier of a state which, on the effective date of this section, has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development;

(3) rates of any controlled carrier in any particular trade which are covered by an agreement effective

under section 6, other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this subsection;

(4) rates governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein and the United States;

(5) a trade served exclusively by controlled carriers; or

(6) any controlled carrier registered in a state which, on the effective date of this Act, is among those designated a beneficiary developing country for purposes of the generalized system of preferences, provided for in title V of the Trade Act of 1974 (88 Stat. 2066; 19 U.S.C. 2461 et seq.), and set forth in general headnote 3(c) of the Tariff Schedules of the United States Annotated (1978), and which has vessels registered within its jurisdiction that are privately owned and not operated by a controlled carrier.

SEC. 11. OCEAN FREIGHT FORWARDERS AND NON-VESSEL-OPERATING COMMON CARRIERS.

(a) BONDING REQUIREMENT.—No person may act as an ocean freight forwarder or non-vessel-operating common carrier unless that person has furnished a bond approved by the Commission of no less than $150,000 that is issued by a surety company found acceptable by the United States Department of the Treasury.

(b) EXCEPTION.—A person whose primary business is the sale of merchandise may forward shipments of such merchandise for his own account without a bond.

(c) COMPENSATION OF FORWARDERS BY CARRIERS.—

(1) An ocean common carrier shall compensate an ocean freight forwarder in connection with any cargo shipment dispatched on behalf of others only when the ocean freight forwarder has certified in writing that it has performed the following services:

(A) engaged, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of such space; and

(B) prepared and processed the ocean bill of lading, the dock receipt, or other similar documents with respect to such cargo.

(2) An ocean common carrier shall not pay compensation for services described in paragraph (1) more than once on the same cargo shipment.

(3) An ocean common carrier shall not pay compensation as provided in this subsection to its agents or any other ocean common carrier or its agents.

(4) No compensation shall be paid to an ocean freight forwarder except in accordance with the tariff provisions contained in section 9(a); and no such forwarder is entitled to receive compensation from a common carrier with respect to any shipment in which the forwarder has a direct or indirect beneficial interest.

SEC. 12. PROHIBITED ACTS.

(a) BY OCEAN COMMON CARRIERS.—No ocean common carrier may—

(1) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with a tariff that is on file with the Commission;

(2) extend or deny to any person any privilege, concession, equipment or facility, except in accordance with such tariffs;

(3) allow any person to obtain transportation by water for cargo or any service in connection therewith at less than the applicable rates by any means;

(4) charge rates which are determined to be so unreasonably high or low as to be detrimental to the commerce of the United States;

(5) charge rates which are unduly prejudicial to United States exporters as compared with their foreign competitors;

(6) continue to impose any surcharge after the increase in costs or loss of revenues that were the subject of the surcharge have been recovered.

(7) retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminatory or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason;

(8) make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of—

(A) rates,

(B) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage,

(C) the loading and landing of freight in proper condition, or

(D) the adjustment and settlement of claims;

(9) use any fighting ship or engage in any practices designed to reduce or eliminate the participation of non-conference carriers;

(10) offer or pay any deferred rebates; or

(11) demand, charge, or collect any rate or charge which is determined by the Commission to be unjustly discriminatory between shippers or ports.

(b) BY SHIPPERS, OCEAN FREIGHT FORWARDERS OR NON-VESSEL-OPERATING COMMON CARRIERS.—No shipper, ocean freight forwarder, or non-vessel-operating common carrier may obtain or attempt to obtain transportation from an ocean common carrier at rates that are less than those specified in such carriers' tariffs on file with the Commission.

(c) BY OTHER PERSONS.—It shall be unlawful for any ocean common carrier, shippper, or other person subject to this Act—

(1) to operate under any agreement described in section 4 that has not become effective under section 6, has been rejected, suspended, or disapproved, or to operate except in accordance with any modifications made by the Commission to the agreement; or

(2) knowingly to disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to an ocean common carrier or other person subject to this Act without the consent by such shipper or consignee if that information—

(A) may be used to the detriment or prejudice of such shipper or consignee;

(B) may improperly disclose its business transactions to a competitor; or

(C) may be used to the detriment or prejudice of any carrier.

Nothing in paragraph (2) shall be construed to prevent providing such information, in response to any legal process, to the Government of the United States or any State, or to any independent neutral body operating within the scope of its authority to fulfill the policing obligations of the parties to an agreement approved under this Act.

SEC. 13. COMPLAINTS, INVESTIGATIONS AND REPARATIONS.

(a) Filing of Complaints.—Any ocean common carrier, shipper, or other person subject to this Act may file with the Commission a sworn complaint alleging a violation of this Act and may seek reparation for any injury caused to the complainant by that violation.

(b) Satisfaction or Investigation of Complaints.—The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein, who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in such manner and by such means, and make such order as it deems proper.

(c) COMMISSION INVESTIGATIONS.—The Commission, upon its own motion, may in like manner and, with the same powers, investigate any violation of this Act.

(d) REPORTS OF INVESTIGATIONS.—The Commission shall enter a written report of every investigation made under this Act in which a hearing was held, which states its conclusions, decisions, findings of fact, and order. A copy of such report shall be furnished to all parties. The Commission shall publish such reports for public information and such authorized publications shall be competent evidence of such reports in all courts of the United States, and of each of the States, territories, districts, and possessions thereof.

(e) REPARATIONS.—After notice and hearing of any complaint filed pursuant to subsection (a) of this section within one year, the Commission may when appropriate direct the payment of reparations to the complainant for actual injury caused by a violation of this Act.

SEC. 14 SUBPENAS AND DISCOVERY.

(a) IN GENERAL.—In investigations and adjudicatory proceedings under this Act—

(1) depositions, written interrogatories, and discovery procedures may be utilized by any party under rules and regulations issued by the Commission which

rules and regulations, to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States; and

(2) the Commission may by subpena compel the attendance of witnesses and the production of books, papers, documents, and other evidence.

(b) WITNESS FEES.—Witnesses shall, unless otherwise prohibited by law, be entitled to the same fees and mileage as in the courts of the United States.

(c) SUSPENSION OF TARIFFS.—After notice and opportunity for hearing, the Commission may suspend any or all tariffs of any ocean common carrier, or the right of a conference member to utilize conference tariffs, if the carrier or conference fails to supply information authorized to be obtained under subsection (a). Any suspension ordered pursuant to this subsection shall be immediately submitted to the President who may disapprove it if he finds such disapproval is required for national defense or foreign policy reasons.

(d) CIVIL PENALTY.—Any ocean common carrier who accepts or handles cargo for carriage under tariffs which have been suspended pursuant to this section shall be subject to a civil penalty of not more than $50,000 for each shipment.

(e) ASSISTANCE OF SECRETARY OF STATE IN OBTAINING INFORMATION.—If, in defense of its failure to comply with a subpena or discovery order issued under this section, an ocean common carrier alleges that documents or information located in a foreign country cannot be produced because of the laws of that country, the Commission shall immediately notify the Secretary of State of such failure to comply and of the allegation relating to foreign laws. Upon receiving such notification, the Secretary of State shall promptly consult with the government of the nation within which the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought.

SEC. 15 PENALTIES.

(a) ASSESSMENT OF PENALTY.—If the Commission finds, after notice and opportunity for hearing, that any shipper, shipper's council, ocean common carrier, conference, ocean freight forwarder, or other person subject to this Act has violated any provision of this Act, or any regulation issued thereunder, such person is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation shall constitute a separate offense. The amount of each civil penalty shall be assessed by the Commission, by written notice. In determining the amount of such penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(b) Tariff Suspension for Rebating.—(1) For any violation of section 12(a) (1), (2), and (3), the Commission may suspend any or all tariffs of any ocean common carrier, or the member's right to use conference tariffs, for a period not to exceed 12 months. Any suspension ordered pursuant to this subsection shall be immediately submitted to the President who may disapprove it if he finds such disapproval is required for national defense or foreign policy reasons.

(2) Any ocean common carrier who accepts or handles cargo for carriage under tariffs which have been suspended pursuant to this subsection shall be subject to a civil penalty of not more than $50,000 for each shipment.

(c) Review of Civil Penalty.—Any person against whom a civil penalty is assessed under subsection (a) of this section may obtain review thereof under chapter 158 of title 28, United States Code.

(d) Action Upon Failure to Pay Assessment.—If any person fails to pay an assessment of a civil penalty after it has become final and an unappealable order, or after the appropriate court has entered final judgment in favor of the

Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(e) COMPROMISE OR OTHER ACTION BY COMMISSION.—The Commission may compromise, modify, or remit, with or without, conditions, any civil penalty which is subject to assessment under this section.

(f) LIMITATIONS.—(1) No fine or other punishment shall be assessed on any person for criminal conspiracy after August 29, 1972, to violate any provision of this Act or to defraud the Commission by concealment of any such violation.

(2) Any formal proceeding to assess any penalty under this section shall be commenced within 5 years from the date when the violation occurred.

SEC. 16. COMMISSION ORDERS.

(a) IN GENERAL.—Orders of the Commission relating to any violation of this Act or to any regulation issued thereunder shall be made only after opportunity for hearing and upon complaint or on its own motion. Each order of the Commission shall continue in force for the period of time specified in the order, or until suspended, modified, or set aside by the Commission or a court of competent jurisdiction.

(b) REVERSAL OR SUSPENSION OF ORDERS.—The Commission may reverse, suspend, or modify any order made by it, and upon application of any party to a proceeding may grant a rehearing of the same or any matter determined therein. No rehearing shall, except by special order of the Commission, operate as a stay of such order.

(c) ENFORCEMENT OF NONREPARATION ORDERS.—In case of violation of any order of the Commission, or for failure to comply with a Commission subpena, the Commission, or any party injured by such violation, or the Attorney General may seek enforcement by any United States district court having jurisdiction over the parties. If after hearing, the court determines that the order was properly made and duly ordered, it shall enforce the order by an appropriate injunction or other process, mandatory, or otherwise.

(d) ENFORCEMENT OF REPARATION ORDERS.—(1) In case of violation of any order of the Commission for the payment of reparation, the person to whom such award was made may seek enforcement of such order in any United States district court having jurisdiction of the parties.

(2) In any United States district court the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for

costs, nor for the costs of any subsequent stage of the proceedings, unless they accrue upon his appeal. A petitioner in a United States district court who prevails shall be allowed a reasonable attorney's fee to be assessed and collected as part of the costs of the suit.

(3) All parties in whose favor the Commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties in such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against such defendant not found in that district may be made in any district in which is located any office of, or point to call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

(e) STATUTE OF LIMITATIONS.—Any action seeking enforcement of a Commission order shall be filed within one year from the date of the order.

(f) REPRESENTATION IN COURT.—Attorneys employed by the Commission shall, if the Commission so directs, appear for and represent the Commission in any case before a court of the United States or a State of the United States.

SEC. 17. EXEMPTIONS.

The Commission, upon application or on its own motion, may by order or rule exempt for the future any specified activity or class of agreements between ocean common carriers or other persons subject to this Act from any requirement of this Act, if it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. The Commission may attach conditions to any such exemption any may, by order, revoke any such exemption. No order or rule of exemption or revocation of exemption shall be issued unless opportunity for hearing has been afforded interested persons.

SEC. 18. REGULATIONS.

The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 19. REPEALS AND CONFORMING AMENDMENTS.

(a) REPEALS.—The laws specified in the following table are repealed.

Shipping Act, 1916:	
14a	46 U.S.C. 813
14b	46 U.S.C. 813a
18(b)	46 U.S.C. 817(b)
18(c)	46 U.S.C. 817(c)
26	46 U.S.C. 825
43	46 U.S.C. 841a
Merchant Marine Act, 1920:	
20	46 U.S.C. 812
Merchant Marine Act, 1936:	
212(e)	46 U.S.C. 1122(e)
214	46 U.S.C. 1124

(b) CONFORMING AMENDMENTS.—The Shipping Act, 1916, is amended by redesignating secti[illegible] 3, and all references thereto, as section 4 and inserting the following new section after section 2:

"SEC. 3. Commencing with the date of enactment of this section, the provisions of sections, 4, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 29, 30, 31, 32, 33, 34, 35, and 44 of this Act shall be deemed to apply only to commerce related to transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States or between places in the same Territory, District, or possession.".

(c) EFFECT ON CERTAIN AGREEMENTS AND CONTRACTS.—All agreements, contracts, and modifications previously approved by the Commission will continue in force and effect as if approved under the provisions of this Act, and all new agreements, contracts, and all modifications to existing, pending, or new contracts or agreements shall be considered under the provisions of this Act.

II

97TH CONGRESS
1ST SESSION

S. 125

To revise and codify the Shipping Act, 1916, and related laws.

IN THE SENATE OF THE UNITED STATES

JANUARY 15 (legislative day, JANUARY 5), 1981

Mr. INOUYE introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To revise and codify the Shipping Act, 1916, and related laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Ocean Shipping Act of 1980".

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TITLE I—GENERAL PROVISIONS

SEC. 101. DECLARATION OF POLICY.

(a) The objectives of United States ocean transportation regulation are:

(1) development and maintenance of an efficient, innovative, and economically sound ocean transportation system to meet the current and future needs of United States foreign commerce;

(2) carriage by vessels of United States registry of a substantial portion of the waterborne export and import foreign commerce of the United States in order to further both the economic and national defense goals of the Nation;

(3) protection of the rights of shippers, ports, and consumers by the prevention of discriminatory, prejudicial, unfair or deceptive practices proscribed by this Act;

(4) encouragement of the lowest possible stable freight rates which are commercially feasible and the highest quality service to shippers and consignees consistent with other objectives of this Act;

(5) encouragement of exports from the United States to achieve and maintain a favorable international balance of payments;

(6) comity with nations engaged in trade with the United States;

(7) development and maintenance of a regulatory environment responsive to the needs of the public in which decisions are reached promptly and fairly;

(8) assuring the maintenance of a dependable common carrier service responsive to the needs of exporters and importers in the waterborne foreign commerce of the United States; and

(9) encouragement and support of a regulatory environment which furthers the national objective of the efficient use of fuel for energy conservation through cooperation among carriers, rationalization and similar arrangements.

SEC. 102. DEFINITIONS.

As used in this Act—

(1) "agreement" means understandings, arrangements and associations, written or oral, and any modification or cancellation thereof;

(2) "assessment agreement" means an agreement or any provision of an agreement, whether part of a collective-bargaining agreement or negotiated separately, which provides for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized;

(3) "Commission" means the Federal Maritime Commission established by section 101 of Reorganization Plan Numbered 7 of 1961 (75 Stat. 840);

(4) "common carrier by water" means a person, whether or not actually operating a vessel, who holds himself out to engage in water transportation for hire as a public employment and undertakes to carry for shippers indifferently, but does not include one who holds himself out to engage in transportation by ferryboat or ocean tramp;

(5) "common carrier by water in foreign commerce" means a common carrier by water between the United States or any of its territories or possessions and a foreign country, whether engaged in the import or export trade, and whether or not its service oper-

ates through or originates or terminates at ports of the United States or its territories, or possessions;

(6) "conference" means an association of two or more vessel operating common carriers by water which provide ocean transportation for the carriage of cargo on a particular route or routes within specified geographic limits and which operate within the framework of an agreement establishing freight rates and any other conditions of service;

(7) "consignee" means a person to whom cargo is shipped or to whom cargo is to be delivered pursuant to the terms of the bill of lading;

(8) "contract shipper" means a shipper or consignee who is a party to a patronage contract as defined in this section;

(9) "controlled carrier" means a common carrier by water in foreign commerce which is or whose operating assets are directly or indirectly owned or controlled by a government. Ownership or control by a government shall be deemed to exist if a majority of the interest in the carrier is owned or controlled in any manner by such government, by any agency of the government or by any person, corporation, or entity controlled by such government. Ownership or control shall also be deemed to exist if a government has the

right to appoint or disapprove the appointment of a majority of the directors or the chief operating or executive officer of the carrier;

(10) "deferred rebate" means a return of any freight payments by any common carrier by water in foreign commerce to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purposes, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement;

(11) "freight forwarding" means the dispatching of shipments by any person on behalf of others, via common carrier(s) by water in commerce from the United States or its territories or possessions to foreign countries, and processing the documentation or performing related activities incident to such shipments;

(12) "independent ocean freight forwarder" means a person carrying on the business of freight forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of property to foreign countries;

(13) "intergovernmental maritime agreement" means an agreement between the United States and a foreign government which relates to the carriage of ocean commerce between or among the signatories;

(14) "intermodalism" or "intermodal transportation" means the utilization of two or more different modes of transportation from origin to destination, at least one of which is ocean transportation subject to this Act;

(15) "maritime labor agreement" means any collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but such term does not include an assessment agreement, as defined in this Act;

(16) "non-vessel-operating common carrier" means a common carrier by water that does not operate the vessels by which its ocean transportation serv-

ice is provided. A non-vessel-operating common carrier is a shipper in his relationship with vessel-operating common carriers by water;

(17) "other person subject to this Act" includes conferences, shippers' councils or any person carrying on the business of freight forwarding or furnishing wharf, dock, warehouse, or other terminal facilities in connection with a common carrier by water;

(18) "patronage contract" means an agreement with a common carrier by water in foreign commerce or conference of such carriers by which a contract shipper obtains a lower rate by committing all or a fixed portion of its cargo to such carrier or conference;

(19) "person" includes individuals, corporations, companies, associations, firms, partnerships, societies, joint stock companies, and the Government or any governmental agency of the United States, State, territory or possession thereof, or of any foreign country. Person also includes a trustee, receiver, assignee, or personal representative of a person;

(20) "reciprocal carrier" means a common carrier by water in foreign commerce recognized as a national carrier by the government of the reciprocal nation that contains the ocean port of origin or destination of the

cargo that is subject to an intergovernmental maritime agreement;

(21) "reciprocal nation" means the foreign nation (or organization of foreign nations which have agreed among themselves to act for purposes of administration of their respective cargo preference laws as a single entity) which is the signatory to an intergovernmental maritime agreement;

(22) "shipper" means an owner or person for whose account the ocean transportation of goods is provided;

(23) "shippers' council" means an association of shippers or their agents, other than independent ocean freight forwarders and non-vessel-operating common carriers, established for the purpose of (A) mutual consultation and exchange of information or views in regard to general level of rates, rules, practices, patronage contracts or services, and (B) agreement upon common positions for the purpose of consultation and negotiation with common carriers by water in foreign commerce, conferences of such carriers, or the parties to intermodal agreements in regard to general levels of rates, rules, practices, or services;

(24) "tariff" means any schedule of rates, charges, classifications, rules, and regulations pertain-

ing to ocean transportation or intermodal transportation and includes any supplement, amendment, or reissue;

(25) "territory or possession" includes the Commonwealth of the Northern Marianas, the Commonwealth of Puerto Rico, American Samoa, Guam, the United States Virgin Islands, and any other territory or possession of the United States; and

(26) "United States" or "State" includes the District of Columbia.

TITLE II—FEDERAL MARITIME COMMISSION; REPORTS TO CONGRESS; AUTHORIZATION OF APPROPRIATIONS; CONDITIONS UNFAVORABLE TO FOREIGN COMMERCE; GENERAL RULEMAKING AUTHORITY

SEC. 201. ANNUAL REPORTS TO CONGRESS; LEGISLATIVE PROPOSALS.

(a) No later than April 1 of each year, the Commission shall report to Congress a summary of its activities, expenditures, and receipts under this Act.

(b) Whenever it is of the opinion that a change in the laws administered by it is necessary, the Commission shall submit its legislative recommendations to Congress and simultaneously transmit them to the Executive Office of the

President. No officer or agency of the United States shall have the authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, or requests for appropriations, to any officer or agency of the United States prior to the submission of such recommendations, testimony, comments, or requests for appropriations to the Congress.

SEC. 202. AUTHORIZATION OF APPROPRIATIONS.

(a) Commencing with fiscal year 1982 appropriation of funds required to carry out the provisions of this Act and other laws administered by the Commission shall be subject to annual authorization.

(b) Authorization of appropriations to the Commission shall reflect the need for efficient and timely regulation of the various aspects of ocean commerce in relation to the growth of that commerce and international developments which may affect such need and the national defense goals of the Nation.

SEC. 203. RULES TO COUNTER CONDITIONS UNFAVORABLE TO FOREIGN COMMERCE.

(a) The Commission is authorized and directed in aid of the accomplishment of the objectives of this Act to make rules and regulations affecting shipping in the foreign commerce of the United States not in conflict with United States law in order to adjust or meet general or special conditions unfavorable to such shipping whether in any particular trade or upon any particular route or in foreign commerce generally, and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country.

(b) If, after preliminary investigation, the Commission has reasonable cause to believe that foreign laws, rules, or regulations or competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country have resulted or will result in general or special conditions unfavorable to ocean shipping in foreign commerce whether in any particular trade or upon any particular route or in foreign commerce generally, the Commission may petition the United States district court of any district affected by such rules, regulations, methods, or practices or of any district in which the defendant transacts business, for appropriate injunctive relief pending the outcome of a proceeding pursuant to subsection (a) of this section with respect to such matter. Upon a showing that the Commission has reasonable cause to believe that such conditions do or will exist, a temporary or permanent injunction or restraining order which the court deems just and proper shall be granted without bond, notwithstanding any other provision of law.

SEC. 204. GENERAL RULEMAKING AUTHORITY.

The Commission may promulgate such rules and regulations as may be necessary to carry out the provisions of this Act and other laws administered by the Commission.

TITLE III—AGREEMENTS AND CONTRACTS

SEC. 301. AGREEMENTS REQUIRED TO BE FILED.

(a) Every common carrier by water in foreign commerce, conference of such carriers, or other person subject to this Act, shall file immediately with the Commission a copy, or, if oral, a complete memorandum, of every agreement with another such carrier or other person subject to this Act to which it may be a party or conform in whole or in part which involves transportation by water or related services in the foreign commerce of the United States, and which provides for—

(1) discussing, negotiating, fixing, or regulating transportation rates or fares;

(2) giving or receiving special rates, accommodations, or other special privileges or advantages;

(3) controlling, regulating, or preventing or destroying competition;

(4) pooling or apportioning earnings, losses, or traffic;

(5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

(6) limiting or regulating in any way the volume or character of cargo to be carried; or

(7) any manner of exclusive, preferential, or cooperative working arrangement.

(b) Every common carrier by water in foreign commerce, or conference of such carriers, shall file immediately with the Commission a copy, or, if oral, a complete memorandum, of every agreement with any air carrier, rail carrier, motor carrier, or other common carrier by water which provides for—

(1) the establishment of through routes for the movement of cargo; or

(2) the fixing of through or joint rates, or concurrence in tariffs.

(c) A copy of every agreement among or between shippers or consignees concerning the establishment or operation of a shippers' council in the United States, or a complete memorandum of any such oral agreement, shall be filed immediately with the Commission.

(d) Every agreement submitted for approval pursuant to this section shall be accompanied by a statement setting forth the objectives of the parties and how the anticipated economic and transportation benefits of such agreement further the objectives of the declaration of policy set forth in section 101 of this Act.

(e) The Commission shall publish in the Federal Register a notice of every agreement submitted for approval pursuant to this section within 15 days of the submission of such agreement.

SEC. 302. AGREEMENTS NOT REQUIRED TO BE FILED.

(a) The provisions of section 301, sections 303 through 310, and section 316 of this title do not apply to—

(1) agreements to provide or furnish wharf, dock, warehouse, or other terminal facilities to the extent that such services or facilities are to be provided outside the United States, its territories or possessions;

(2) agreements which relate solely to transportation services between foreign countries; and

(3) agreements which relate to shippers' councils operating exclusively outside the United States; and

(4) assessment agreements and maritime labor agreements, as defined this Act.

(b) The provisions of section 301, and sections 303 through 310 of this title do not apply to patronage contracts as defined in section 102(18) of this Act.

SEC. 303. FORM OF AGREEMENT; REJECTION.

The Commission may by regulation prescribe the form and manner in which agreements shall be filed; and the Commission is authorized to reject any agreement which is not filed in conformity with such regulations.

SEC. 304. ACTION ON AGREEMENTS.

The Commission shall, after notice and hearing, disapprove, cancel, or modify any agreement filed pursuant to section 301 of this title if the Commission finds such agreement to be inconsistent with the declaration of policy or other provisions of this Act. The Commission shall approve all other agreements.

SEC. 305. PRESUMPTION IN FAVOR OF CERTAIN AGREEMENTS.

The following agreements shall be presumed to be consistent with the declaration of policy and other provisions of this Act:

(1) agreements implementing intergovernmental maritime agreements;

(2) conference agreements which contain a right of independent action on reasonable notice;

(3) agreements which are endorsed favorably by all of the shippers' councils of the trades to which the agreement applies, except for agreements between or among shippers; and

(4) agreements relating to equipment interchange, terminal sharing, equipment standardization, or other technical matters.

SEC. 306. TEMPORARY APPROVAL.

(a) Notwithstanding any other provision of law, the Commission may, in its discretion, upon notice but without hearing or other proceeding, grant temporary approval for up to 1 year to any agreement filed pursuant to section 301 of this title pending the Commission's final disposition of the agreement under this title.

(b) In determining whether to grant temporary approval to an agreement pursuant to this section, the Commission shall consider whether:

(1) the parties to the agreement would be substantially harmed if the agreement were not immediately approved and implemented;

(2) any other persons would be substantially harmed, if temporary approval were granted; and

(3) it appears from all the information available to the Commission that temporary approval is necessary to meet an emergency or to fulfill an important public need.

(c) Actions to implement an agreement during a period of temporary approval granted pursuant to this section shall not be construed to be violations of this Act even if the agreement is subsequently disapproved, canceled, or modified by the Commission pursuant to section 304 of this title.

SEC. 307. TIME LIMITS ON COMMISSION ACTION.

(a) Within 8 months of the date of filing of any agreement submitted to the Commission pursuant to section 301 of this title, the Commission shall approve, disapprove, or modify such agreement; however, the Commission may in its discretion and for good cause, extend this time period for an additional 4 months. Failure of the Commission to approve, disapprove, or modify any agreement within the time limits set forth in this subsection shall cause an agreement to be deemed approved.

(b) The Commission shall, within 45 days of the date of filing, grant or deny any request for temporary approval to any agreement pursuant to the authority contained in section 306 of this title. The Commission may withdraw such temporary approval at any time.

(c) The Commission may, at any time, after notice and hearing disapprove, cancel, or modify any agreement previously approved by it or deemed approved pursuant to subsection (a) of this section upon a finding that the agreement is inconsistent with the declaration of policy or other provisions of this Act.

SEC. 308. REQUIREMENT FOR INDEPENDENT ACTION.

The Commission shall not approve any agreement filed pursuant to section 301 (a) or (b) nor shall continued approval be permitted for:

(1) any agreement between carriers not members of the same conference or between conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agree-

ments between conferences, each conference, retains the right of independent action;

(2) any agreement which fails to provide that a member carrier of a conference or other rate-fixing agreement has a right of independent action to serve any United States port designed for the accommodation of oceangoing vessels at the same ocean freight rates charged by the conference or rate-fixing body at the nearest port within the geographic scope of such conference or rate-fixing agreement; or

(3) any intermodal agreement which fails to provide for the right of independent action by air carriers, rail carriers, motor carriers or common carriers by water not subject to this Act to establish their portion of rates or charges or to establish rules and regulations which apply exclusively to the services performed by such carriers: *Provided,* That the requirements of this paragraph (3) shall not apply to agreements with any such carriers operating exclusively within a foreign country or countries in implementing the agreement.

SEC. 309. ADMISSION TO AND WITHDRAWAL FROM CONFERENCES AND SHIPPERS' COUNCILS.

(a) The Commission shall, after notice and hearing, disapprove or modify any conference agreement filed pursuant to section 301 (a) or (b) of this title which, by operation or effect, fails to provide reasonable and equal terms and conditions for admission or readmission to conference membership in the trade covered by the conference agreement or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal. In any hearing under this subsection, the burden of proof shall be upon the persons whose agreement or practice is in question.

(b) The Commission shall, after notice and hearing, disapprove or modify any agreement relating to the establishment or operation of a shippers' council filed pursuant to section 301(c) of this title which, by operation or effect, fails to provide reasonable and equal terms and conditions for admission or readmission to council membership for any shipper whose commercial interests coincide with those of the council or which fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawl. In any hearing under this subsection, the burden of proof shall be upon the persons whose agreement or practice is in question.

SEC. 310. POLICING OBLIGATIONS OF CONFERENCES AND CARRIERS; SHIPPERS' REQUESTS AND COMPLAINTS.

(a) The members of each conference agreement and every ocean common carrier in a trade that is not a party to a conference agreement relating to such trade shall engage the services of an independent neutral body to police the obligations of such conference, conference members, and nonmember carriers under this Act and the approved conference agreement, except that such policing by an independent neutral body shall not be required in any trade for which the Commission finds that the cost of such policing would be unreasonably large in comparison to the size of the trade. The Commission may disapprove any such conference agreement or may suspend for up to 12 months the tariff or tariffs of any such conference, conference member, or nonmember carrier, whenever it finds, after notice and hearing, inadequate policing of such obligations of such conference, conference member, or nonmember carrier.

(b) The Commission shall disapprove, cancel or modify any conference agreement or other rate-fixing agreement filed pursuant to section 301 (a) or (b) of this title, after notice and hearing, upon a finding of failure or refusal to adopt or maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

SEC. 311. ASSESSMENT AGREEMENTS.

Assessment agreements must be filed with the Commission and shall be deemed approved upon filing. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found in such a complaint proceeding to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this section conflicts with the language of any other section of this Act, the Shipping Act 1916, or of the Intercoastal Shipping Act, 1933, the provisions of this section shall control.

SEC. 312. PATRONAGE CONTRACTS.

Any common carrier by water in foreign commerce or conference that proposes to enter into a patronage contract shall submit such contract to the Commission in such form and manner as regulations of the Commission may provide. The Commission shall permit the use of any such patronage contract that meets the requirements of section 313 of this title and which is available to all shippers and consignees on equal terms and conditions, unless the Commission finds, after notice and hearing, that the contract will be inconsistent with the declaration of policy or other provisions of this Act. Agreements between shippers and carriers or conferences in implementation of any permission granted by the Commission pursuant to this section are exempted from the requirements of sections 301, 303, and 304 of this title.

SEC. 313. REQUIREMENTS IN PATRONAGE CONTRACTS.

The Commission shall not permit the use of any patronage contract unless it expressly—

(1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide space requested on reasonable notice by the shipper;

(2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, it shall not be increased on less than 60 days' notice unless specifically authorized by the Commission. A rate subject to the contract may be increased on not

less than 30 days' notice if the increase is to a level no higher than that from which the particular rate was reduced within 180 days immediately preceding the filing of the increase;

(3) covers only those goods of the contract shipper for which the contract shipper has the legal right at the time of shipment to select the carrier. It shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid its obligation under the contract, the contract shipper divests itself, or with the same intent permits itself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract;

(4) does not require the contract shipper to divert shipments of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available;

(5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law. The contract may specify, however, that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges

computed at the contract rate on the particular shipment, less the cost of handling;

(6) permits the contract shipper to terminate the contract without penalty on 90 days' notice;

(7) permits the carrier or conference on 90 days' notice to terminate the contract rate system in whole or with respect to any commodity without penalty;

(8) provides for a spread between ordinary rates and rates charged contract shippers that is not greater than 18 percent of the ordinary rates if both shipper and consignee are parties to the contract, or that is not greater than 13 percent of the ordinary rates if only the shipper or the consignee is a party to the contract; and

(9) contains such other provisions as the Commission shall require.

SEC. 314. WITHDRAWAL OF PERMISSION TO USE PATRONAGE CONTRACTS.

The Commission shall withdraw permission for the use of any patronage contract if it finds, after notice and hearing, that the use of such contract is inconsistent with the declaration of policy or other provisions of this Act.

SEC. 315. REINSTATEMENT OF PATRONAGE CONTRACTS.

After termination of a patronage contract by the carrier or conference, or withdrawal of permission for the use of a patronage contract by the Commission, the carrier or conference shall not reinstate such contract or part thereof without prior permission by the Commission in accordance with the provisions of sections 312 and 313 of this title.

SEC. 316. EXEMPTIONS FROM ANTITRUST LAWS.

(a) The antitrust laws of the United States shall not apply to:

(1) an agreement described in section 301 or 302 of this title or any activity described in section 301 or 302 of this title; and

(2) a patronage contract, as defined in section 102(18) of this Act, or any activity pursuant to a patronage contract.

(b) For the purposes of this Act, the antitrust laws of the United States shall include: the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548), as amended; and amendments and Acts supplementary thereto.

SEC. 317. UNLAWFUL AGREEMENTS AND PATRONAGE CONTRACTS.

(a) It shall be unlawful for any agreement or patronage contract subject to this title to be implemented without prior Commission approval or permission.

(b) Whoever violates subsection (a) of this section shall be subject to a civil penalty of not more than $25,000 for each day that the agreement or patronage contract is in effect without Commission approval or permission.

TITLE IV—TARIFFS AND RATES

SEC. 401. REQUIREMENTS FOR FILING AND CONTENT OF TARIFFS.

(a) Every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission, and keep open to public inspection, tariffs showing all the rates and charges of such carrier or conference between all points on its own route and on any through route which has been established in the foreign commerce of the United States. Such tariffs shall plainly indicate the places between which cargo will be carried, shall list each classification of cargo in use, and shall also state separately each additional charge, privilege, or facility under the control of the carrier or conference which is granted or allowed, and any rules or regulations which in any way change, affect, or determine any part or the aggregate of such rates or charges, and shall include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

(b) The Commission shall by regulation prescribe the form and manner in which the tariffs required by this title shall be published and filed and is authorized to reject any tariff which is not in conformity with this title and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

SEC. 402. EXCEPTION TO FILING REQUIREMENTS.

The requirements of this title shall not be applicable to cargo loaded and carried in bulk without mark or count or to cargo which is softwood lumber. As used in this section, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

SEC. 403. PUBLIC AVAILABILITY OF TARIFFS.

Copies of such tariffs shall be made available to any person and a reasonable charge may be assessed for them.

SEC. 404. RATES FOR BARGING AND AFFREIGHTING OF CONTAINERS.

(a) Notwithstanding chapter 107 of subtitle IV of title 49, United States Code, or any other provision of law, rates and charges for the barging and affreighting of containers and containerized cargo by barge between points in the United States, shall be filed solely with the Commission, in accordance with rules and regulations promulgated by the Commission, if:

(1) the cargo is moving between a point in a foreign country and a point in the United States, or a territory or possession of the United States;

(2) the transportation by barge between points in the United States is furnished by a terminal operator as a service substitute in lieu of a direct vessel call by the common carrier by water in foreign commerce transporting the containers or containerized cargo under a through bill of lading;

(3) such terminal operator is a municipality, or other public body or agency subject to the jurisdiction of the Commission, and the only one furnishing the particular circumscribed barge service in question as of the date of enactment of this section; and

(4) such terminal operator is in compliance with the rules and regulations of the Commission for the operation of such barge service.

A terminal operator providing services described in this subsection shall be subject to the provisions of this Act.

(b) The Commission shall promulgate rules and regulations for the barge operations described in subsection (a) of this section. Such rules shall provide that the rates charged shall be based upon factors normally considered by a regular commercial operator in the same service.

SEC. 405. RATE CHANGES.

(a) No change shall be made in rates, charges, classifications, rules, or regulations, nor shall any new or initial rate be instituted, except by the publication and filing of a new tariff or tariffs with the Commission. Each such new tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the date when the rates, charges, classifications, rules, or regulations as changed are to become effective.

(b) Except as provided in section 406 of this title, no new tariff or tariffs published and filed with the Commission pursuant to subsection (a) of this section may become effective earlier than:

(1) Fifteen days after the date of such publication and filing in the case of a proposed reduction in rates or charges; or

(2) Thirty days after the date of such publication and filing in the case of any other proposed change in rates, charges, classifications, rules, or regulations.

SEC. 406. COMMISSION DISCRETION IN RATE CHANGES.

The Commission, in its discretion and for good cause, may allow changes and new or initial rates to become effective upon less than the period specified in section 405 of this title.

SEC. 407. ADHERENCE TO PUBLISHED RATES BY CARRIERS.

(a) No common carrier by water in foreign commerce or other person subject to this Act shall charge, demand, or receive a greater, less, or different compensation for the transportation of cargo or for any related service than the rates or charges specified in its applicable tariffs in effect at that time.

(b) No common carrier by water in foreign commerce, nor any officer, employee or agent thereof, shall—

(1) rebate, refund or remit in any manner or by any device any portion of the rates or charges specified in the applicable tariffs in effect at that time;

(2) extend or deny to any person any privilege, concession, equipment, or facility, except in accordance with such tariffs; or

(3) allow any person to obtain transportation of cargo at less than the rates or charges specified in such tariffs by any other means.

SEC. 408. ADHERENCE TO PUBLISHED RATES BY SHIPPERS AND OTHER PERSONS SUBJECT TO THE ACT.

Except as permitted by the Commission under section 409 of this title and except with respect to negotiations relating to future shipments, no shipper, consignee, forwarder, other person subject to this Act, nor any officer, employee, or agent thereof, shall receive, demand, obtain or attempt to obtain by any device or means, transportation of cargo by a common carrier by water in foreign commerce or conference of such carriers, or any service related thereto, at less than the rates and charges specified in applicable tariffs of that carrier or conference on file with the Commission and in effect at that time. However, neither the penalty prescribed by section 420 of this title nor any other penalty shall be imposed upon any shipper or other person subject to this Act for a violation of this section that occurs because of clerical or administrative error or inadvertence on the part of the shipper or other person subject to this Act.

SEC. 409. PERMISSION TO DEPART FROM TARIFFS.

Upon application of a common carrier by water in foreign commerce, a conference of such carriers, or a shipper, the Commission may, in its discretion and for good cause shown, permit such a carrier or conference to refund a portion of freight charges collected from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund will not result in discrimination among shippers, ports, or carriers. This permission may not be granted unless the carrier or conference has, prior to applying for authority to make refund, or in the case of an application filed by a shipper, within 20 days after the application, filed a new tariff with the Commission setting forth the rate on which the refund would be based, and the carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require which give notice of the rate on which the refund would be based, and additional refunds as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application. Any application for refund pursuant to this section must be filed with the Commission within 180 days from the date of shipment.

SEC. 410. DISAPPROVAL OF RATES IN FOREIGN COMMERCE.

The Commission shall disapprove any rate or charge filed by a common carrier by water in foreign commerce or conference of such carriers which, after notice and hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States or in violation of any of the prohibitions contained in title V of this Act.

SEC. 411. RATE DISPARITIES.

Upon the complaint of an exporter from the United States or an association representing such exporters, the Commission may disapprove any rate or charge of a common carrier by water in foreign commerce or conference of such carriers for the carriage of cargo from the United States to any foreign country if, allowing for differences in cost due to variances in relevant transportation factors, such rate or charge is higher than the rate or charge of that carrier or conference for the carriage of cargo which moves under the same commodity description from:

(a) that foreign country to the United States; or

(b) a third country to that foreign country.

SEC. 412. RATES OF CONTROLLED CARRIERS.

No controlled carrier shall maintain rates or charges in its tariffs filed with the Commission that are below a level which is just and reasonable, nor shall any such carrier establish or maintain unjust or unreasonable classifications, rules, or regulations in such tariffs. An unjust or unreasonable classification, rule, or regulation means one which results or is likely to result in the transportation or handling of cargo at rates or charges which are below a level which is just and reasonable.

SEC. 413. CRITERIA FOR DETERMINING JUST AND REASONABLE RATES OF CONTROLLED CARRIERS.

In determining whether rates, charges, classifications, rules, or regulations of a controlled carrier are just and reasonable, the Commission may take into account transportation factors, including but not limited to, whether (1) the rates or charges which have been filed or which would result from the pertinent classifications, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or, at the Commission's discretion, upon constructive costs, which are defined as the costs of a carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade; (2) the rates, charges, classifications, rules, or regulations are the same as or similar to those filed or assessed by other carriers in the same trade; (3) the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or (4) the rates, charges, classifications, rules, or regulations are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

SEC. 414. BURDEN OF PROOF AND DISAPPROVAL OF UNJUST AND UNREASONABLE CONTROLLED CARRIER RATES.

The Commission may at any time, after notice and hearing, disapprove any rates, charges, classifications, rules, or regulations which a controlled carrier has failed to demonstrate to be just and reasonable. In any proceeding under section 412 or 413 of this title, the burden of proof shall be on the controlled carrier to demonstrate that its rates, charges, classifications, rules, or regulations are just and reasonable.

SEC. 415. JUSTIFICATION OF CONTROLLED CARRIER RATES.

Within 20 days of a request by the Commission, a controlled carrier shall file a statement of justification which details the need and purpose for its existing or proposed rates, charges, classifications, rules, or regulations.

SEC. 416. SUSPENSION OF RATES AND ISSUANCE OF SHOW CAUSE ORDERS TO CONTROLLED CARRIERS.

(a) Whenever the Commission is of the opinion that the rates, charges, classifications, rules, or regulations filed by a controlled carrier may be unjust and unreasonable, the Commission may issue an order to that carrier to show cause why such rates, charges, classifications, rules, or regulations should not be disapproved.

(b) Pending a determination as to their lawfulness in such a proceeding, the Commission may suspend such rates, charges, classifications, rules, or regulations:

(1) at any time prior to their effective date, or

(2) on not less than 60 days' notice in the case of rates, charges, classifications, rules, or regulations which have already become effective.

(c) In no event may the total period or periods of suspension pursuant to this section exceed 180 days.

(d) Whenever the Commission has suspended any rates, charges, classifications, rules, or regulations pursuant to this section, the affected carrier may file new rates, charges, classifications, rules, or regulations to take effect immediately during the suspension period. The Commission may reject such new rates, charges, classifications, rules, or regulations if it is of the opinion that they are unjust and unreasonable.

SEC. 417. EFFECT OF REJECTION, SUSPENSION, OR DISAPPROVAL.

Rates, charges, classifications, rules, or regulations of a controlled carrier which have been rejected, suspended, or disapproved by the Commission are void and their use is unlawful.

SEC. 418. PRESIDENTIAL REVIEW OF ORDERS AFFECTING CONTROLLED CARRIERS.

The Commission shall transmit to the President, concurrently with its service, any order of suspension or final order of disapproval of rates, charges, classifications, rules, or regulations of a controlled carrier. Within 20 days after the receipt of such Commission order, the President may request the Commission in writing to stay the effect of its order for reasons of national defense or foreign policy, which reasons shall be specified in the request. Notwithstanding any other provision of law, the Commission shall comply with such request.

SEC. 419. CONTROLLED CARRIERS EXEMPT FROM REGULATION.

The provisions of sections 412 through 418 of this title shall not apply to:

(1) rates, charges, classifications, rules, or regulations of a controlled carrier in any particular trade which are established pursuant to a conference or other rate fixing agreement approved under title III of this Act, other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this title;

(2) rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined in section 102(9) of this title, and the United States, or any of its territories or possessions; or

(3) a trade served exclusively by controlled carriers.

(4) any controlled carrier of a nation whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment; or

(5) any controlled carrier of a nation which, on or before November 17, 1978, had subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development.

SEC. 420. PENALTIES.

(a) Whoever violates sections 407(b) or 408 of this title shall be subject to a civil penalty of not less than $10,000 nor more than $25,000 for each such violation.

(b) In addition to the penalty set forth in subsection (a) of this section, the Commission may suspend, for a period not exceeding 12 months, any or all tariffs of a common carrier by water in foreign commerce if such carrier or an officer, employee, or agent of such carrier is found to have violated section 407(b), or may suspend the carrier's right to use any or all conference tariffs to which it may subscribe.

(c) For the purposes of fixing penalties for violations of section 407, 408, or 417 of this title, each shipment on which a rebate or concession was made, or in connection with which an unlawful rate or charge was collected or received, shall constitute a separate violation. A shipment means all of that cargo the carriage of which is evidenced by a single bill of lading.

(d) Whoever violates section 417 shall be subject to a civil penalty of not less than $5,000 nor more than $10,000 for each shipment accepted in violation thereof.

(e) Whoever violates any other provision of this title shall be subject to a civil penalty of not more than $5,000 for each such violation.

TITLE V—DISCRIMINATION, PREFERENCE, PREJUDICE, AND OTHER PROHIBITED ACTS

SEC. 501. DEFERRED REBATES.

No common carrier by water in foreign commerce shall pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper.

SEC. 502. PROHIBITED PREDATORY PRACTICES.

Except as authorized by the Commission pursuant to title III of this Act, no common carrier by water in foreign commerce, nor shipper, nor other person subject to this Act nor any group of such carriers or other persons shall engage in any practice or activity for the purpose of excluding, preventing, reducing or destroying competition.

SEC. 503. PROHIBITED TREATMENT OF SHIPPERS.

Except as permitted by the terms of its tariff, no common carrier by water in foreign commerce shall refuse or threaten to refuse space accommodations or other transportation services or equipment to any shipper when such are available; nor shall any common carrier by water in foreign commerce discriminate against or unfairly treat a shipper because it has patronized any other carrier, has filed a complaint charging unfair treatment, or for any similar reason.

SEC. 504. UNREASONABLE PREFERENCE OR PREJUDICE.

(a) It shall be unlawful for any common carrier by water in foreign commerce, shipper or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly, to make or give any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in any respect whatsoever, or to subject any particular person, port, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(b) Within 30 days after the effective date or the filing with the Commission, whichever is later, of any conference rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, territory or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation subjects that State, territory or possession to undue or unreasonable prejudice or disadvantage or results in undue or unreasonable preference or advantage to some other State, territory or possession, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be canceled. Within 180 days from the date of issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation results in undue or unreasonable prejudice or disadvantage and shall issue a final order either dismissing the protest or canceling the rate, rule, or regulation.

SEC. 505. UNJUST DISCRIMINATION.

No common carrier by water in foreign commerce shall demand or collect any rate or charge or engage in any practice whether by tariff publication or otherwise which is unjustly disciminatory between shippers or between ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Commission finds, after notice or hearing, that such a carrier has demanded or collected any such rate or charge, or engaged in any such practice, it may alter the same to the extent necessary to correct such unjust discrimination and shall order the carrier to discontinue demanding or collecting any such rate or charge or engaging in any such practice. Upon a finding of unjust discrimination in a complaint proceeding pursuant to section 801 of this Act, the commission may award reparation to a complainant on the basis of the damages sustained.

SEC. 506. UNJUST REGULATIONS AND PRACTICES.

No common carrier by water in foreign commerce nor any other person subject to this Act shall establish, observe, or enforce unjust or unreasonable regulations or practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforcement of a just and reasonable regulation or practice.

SEC. 507. DISCONTINUANCE OF PROHIBITED PRACTICES.

Upon a finding of a violation of any provision of this title, the Commission shall order the common carrier by water in foreign commerce, shipper or other person subject to this Act to discontinue such unlawful activity.

SEC. 508. MARITIME LABOR AGREEMENTS.

The provisions of this title shall not apply to maritime labor agreements and all provisions of such agreements. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act for any rates, charges, regulations, or practices of common carrier by water or other person subject to this Act which are required to be set forth in a tariff whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

SEC. 509. PENALTIES.

Whoever violates any provision of this title shall be subject to a civil penalty of not less than $5,000 nor more than $25,000 for each such violation.

TITLE VI—LICENSING AND BONDING

PART A—FREIGHT FORWARDER LICENSES

SEC. 601. PROHIBITION AGAINST FREIGHT FORWARDING WITHOUT A LICENSE.

No person shall engage in freight forwarding as defined in this Act in connection with any shipment unless the person has been issued a license by the Commission, except that a person whose primary business is the sale of merchandise may forward shipments of such merchandise for his own account without a license.

SEC. 602. LICENSING.

An independent ocean freight forwarder's license shall be issued to any person who is not a shipper or consignee or a seller or purchaser of property to foreign countries and who the Commission determines is otherwise qualified. All licenses issued prior to the effective date of this Act, shall be deemed to have been issued under this Act: *Provided,* That a bond or other security required by the Commission under section 603 is filed within 90 days after the effective date of this Act.

SEC. 603. BOND REQUIREMENT.

No independent ocean freight forwarder's license shall be issued or remain in force unless the license applicant or holder shall have furnished a bond in an amount to be determined by the Commission, but in no event less than $50,000. Bonds shall be issued only by surety companies found acceptable by the United States Department of the Treasury.

SEC. 604. REVOCATION OF LICENSE.

(a) Licenses of independent ocean freight forwarders shall be effective from the date of issue and until suspended or revoked. Any such license may, upon application of the holder, be amended or revoked, in whole or in part, or may, upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act or with any lawful order, rule, or regulation of the Commission.

(b) Any person whose license has been revoked with prejudice upon a finding of a violation of this Act, or the rules and regulations of the Commission, or any responsible officer, manager, or employee of such person whose actions have been found, after notice and hearing, to have contributed directly to such violation, may not be licensed nor associated with a licensee in an ownership or management capacity, for a period of 5 years after such finding. Subsequent to this 5-year period applications for licenses by such persons shall not be approved unless the Commission is satisfied that the person will refrain from any further activity in violation of this Act, or of the rules and regulations of the Commission.

SEC. 605. COMPENSATION OF FORWARDERS BY CARRIERS.

(a) Except as otherwise provided in subsection (c) of this section a common carrier by water in foreign commerce shall compensate an independent ocean freight forwarder in connection with any cargo shipment dispatched on behalf of others only when the independent ocean freight forwarder is licensed and has performed all of the following services:

(1) engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of such space;

(2) prepared and processed the ocean bill of lading with respect to such cargo; and

(3) prepared and processed the dock receipt or other documents which are normally the responsibility of the carrier.

(b) A common carrier by water in foreign commerce shall not pay compensation for services described in subsection (a) of this section more than once on the same cargo shipment.

(c) No compensation for freight forwarding services shall be paid to or received by any person until there is written certification by that person to the common carrier by water in foreign commerce that such person:

(1) is licensed by the Commission as an independent ocean freight forwarder; and

(2) performed the services specified in subsection (a) of this section with respect to such shipment.

(d) A common carrier by water in foreign commerce shall not pay compensation for freight forwarding services as provided in this section to its agents or any other common carrier by water or its agents.

(e) Every tariff of a common carrier by water in foreign commerce filed pursuant to section 401 of this Act shall specify the rate of compensation to be paid licensed independent ocean freight forwarders who have provided the certification required under subsection (c) of this section and no such compensation shall be paid except in accordance with such tariff provisions.

(f) An independent ocean freight forwarder shall not be entitled to receive compensation from a common carrier with respect to any shipment in which such freight forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate or associate of such freight forwarder or any officer, director, agent or executive of such freight forwarder directly or indirectly has a beneficial or pecuniary interest.

PART B—NON-VESSEL-OPERATING COMMON CARRIERS

SEC. 606. BONDING REQUIREMENTS.

Every non-vessel-operating common carrier located in the United States, or a territory or possession of the United States, shall file with the Commission, simultaneously with the filing of its tariffs, a bond in the amount of $100,000 to ensure its financial responsibility to the users of its services. Such bonds shall be issued only by a surety company found acceptable by the United States Department of the Treasury. Such common carriers maintaining effective tariffs on file with the Commission on the date of enactment of this Act shall file the required bonds within 90 days after the date of enactment of this Act.

TITLE VII—EXEMPTIONS

SEC. 701. EXEMPTIONS FROM REGULATION.

The Commission may, by order or rule, exempt any class of agreements subject to this Act or any specified activity subject to this Act from any requirement of this Act if the provisions of this title are met.

SEC. 702. CRITERIA FOR GRANTING EXEMPTIONS.

A rule or order of exemption may be issued only after notice and opportunity for hearing and only if the Commission determines that the exemption will not (1) substantially impair effective regulation by the Commission, (2) be unjustly discriminatory, or (3) be inconsistent with the declaration of policy or other provisions of this Act.

SEC. 703. CONDITIONS; REVOCATION OF EXEMPTIONS.

The Commission may attach any conditions to exemptions granted under this title, and may revoke any such exemption after notice and opportunity for hearing.

TITLE VIII—COMMISSION PROCEEDINGS; SUBPENAS AND DISCOVERY; ENFORCEMENT OF COMMISSION ORDERS; PENALTIES

SEC. 801. FILING OF COMPLAINTS.

Any person may file with the Commission a sworn complaint alleging a violation of this Act by a common carrier by water in foreign commerce, shipper, or other person subject to this Act, and may seek reparation for any injury caused by that violation.

SEC. 802. SATISFACTION OR INVESTIGATION OF COMPLAINTS.

The Commission shall furnish a copy of a complaint filed pursuant to section 801 of this title to the carrier, shipper, or other person named therein, who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in such manner and by such means, and make such order as it deems proper.

SEC. 803. REPARATION UPON COMPLAINT.

If the complaint is filed pursuant to section 801 of this title within 1 year after the cause of action accrued, the Commission may direct the payment of reparation to the complainant.

SEC. 804. COMMISSION INVESTIGATIONS AND SUBPENAS.

The Commission may, upon its own motion, investigate any suspected violation of this Act in the manner and by the means it deems proper. In any such investigation the Commission may, by subpena, compel the attendance of witnesses and the production of books, papers, documents, and other evidence, in accordance with its rules and regulations. Attendance of witnesses and the production of books, papers, documents, and other evidence in response to subpena may be required at any designated place. Witnesses shall, unless otherwise prohibited by law, be entitled to the same fees and mileage as provided by courts of the United States.

SEC. 805. DISCOVERY AND SUBPENAS IN COMMISSION PROCEEDINGS.

(a) In adjudicatory proceedings under this title, and in any other proceeding in which the Commission deems it necessary and proper, depositions, written interrogatories, and discovery procedure may be utilized by any party under rules and regulations issued by the Commission. Such rules and regulations shall, to the extent practicable, be in conformity with the rules applicable in civil proceedings in the district courts of the United States. The subpena powers vested in the Commission in section 804 shall be applicable to all adjudicatory proceedings under this title.

(b) Failure or refusal by any common carrier by water in foreign commerce or other person subject to this Act to comply fully with any subpena or duly issued order compelling an answer to interrogatories or to designated questions propounded by deposition or compelling production of documents in connection with any adjudicatory proceeding conducted pursuant to this title, shall authorize the Commission, in addition to any other authority granted to it by section 812 of this title or other provisions of this Act, to suspend after appropriate notice and opportunity for hearing, any or all tariffs filed with the Commission by or on behalf of such common carrier or such other person, or, in the case of conference tariffs, any or all rights of such common carrier to utilize such tariffs until a full response has been given to the pertinent deposition, interrogatory, production request or motion, or subpena. During any period of suspension ordered pursuant to this subsection, the Commission may reject any new tariff matter which is filed to replace in whole or part that which has been suspended. Any tariff suspension order issued pursuant to this subsection shall be immediately submitted to the President who may, within 10 days after receiving it, disapprove such order if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States. Any common carrier by water in foreign commerce or other person whose tariffs or rights of use thereof have been suspended pursuant to this subsection and who accepts or handles cargo for transportation during the suspension period, which cargo otherwise would have been governed by the provisions of the suspended tariffs, shall be subject to a civil penalty of not less than $5,000 nor more than $50,000 for each shipment so accepted or handled.

(c) If, in failing or refusing to comply with a subpena or discovery order issued under subsection (a) of this section, a common carrier by water in foreign commerce or other person alleges documents or information are located in a foreign country and cannot be produced because of the laws of that country, the Commission, upon ordering the suspension of tariffs or use thereof by such common carrier or other person, shall also notify the Secretary of State of such failure to comply and of the allegation relating to foreign laws. Upon receiving such notification, the Secretary of State shall promptly consult with the government of the nation within which the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought.

SEC. 806. FILING OF PERIODIC OR SPECIAL REPORTS.

(a) The Commission may, by order, require any common carrier by water in foreign commerce, shipper, consignee, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodic or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions pertaining to the business of such carrier or other person subject to this Act. The Commission may prescribe the form and manner in which such reports shall be made and may require specific and complete answers to questions upon which it may deem information to be necessary, or the creation of memorandums or reports concerning transactions, facts, or practices in connection with which documents may not already exist.

(b) The Commission shall require the chief executive officer of every vessel operating common carrier by water in foreign commerce and, to the extent it deems feasible, may require any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to this Act, to file a periodic, written certification under oath with the Commission attesting to—

(1) a policy prohibiting the payment, solicitation, or receipt of any rebate which is unlawful under the provisions of this Act;

(2) the fact that such policy has been promulgated recently to each owner, officer, employee, and agent thereof;

(3) the details of the efforts made, within the company or otherwise, to prevent or correct illegal rebating; and

(4) a policy of providing full cooperation to the Commission in its investigation of illegal rebating or refunds in United States foreign trades; and in its efforts to end such illegal practices.

(c) Whoever fails to file any report, account, record, rate, charge, or memorandum required pursuant to this section shall be subject to a civil penalty of not more than $5,000 for each day of default.

(d) In addition to the civil penalty provided in subsection (c) of this section, whoever fails to file any report, account, record, rate, charge, or memorandum required pursuant to this section shall be subject to the same sanctions as provided by subsection 805(b) of this Act for failure to comply with subpenas or discovery orders.

(e) Whoever willfully falsifies, destroys, mutilates, or alters any report, account, record, rate, charge, or memorandum required pursuant to this section, or willfully files a false report, account, record, rate, charge, or memorandum required pursuant to this section, shall be subject to a civil penalty of not less than $5,000, nor more than $25,000.

SEC. 807. ISSUANCE OF ORDERS.

Orders of the Commission relating to any violation of this Act or of any Commission rule or regulation issued pursuant to it shall be made only after opportunity for hearing, and upon a sworn complaint or in proceedings instituted on the Commission's own motion.

SEC. 808. REPORT OF COMMISSION INVESTIGATIONS.

The Commission shall issue and furnish to all parties a written report of every investigation made under this Act in which a hearing has been held. Such report shall state its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made.

SEC. 809. EVIDENTIARY COMPETENCE OF COMMISSION REPORTS.

The Commission may publish reports of Commission investigations in the form best adapted for public information and use, and such publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, territories, and possessions thereof.

SEC. 810. REVERSAL OR MODIFICATION OF COMMISSION ORDERS.

The Commission may reverse, suspend, or modify any of its orders in any manner that it deems proper. Upon application of any party to a proceeding, the Commission may reconsider its decision, order, or any matter determined therein, but no such application for or granting of reconsideration shall, except by special order of the Commission, operate as a stay of such order.

SEC. 811. EFFECTIVE PERIOD OF COMMISSION ORDERS.

All orders of the Commission made under this Act shall continue in force for the period of time specified in the order, or until suspended, modified, or set aside by the Commission or by a court of competent jurisdiction.

SEC. 812. ENFORCEMENT OF ORDERS.

In the case of violation of any order of the Commission, other than for the payment of reparation, or in case of a failure by a person to comply fully with any subpena issued by the Commission, the Commission, any party injured by the violation, or the Attorney General of the United States, may seek enforcement in any United States district court having jurisdiction over the parties, and if, after hearing, the court determines that the order was properly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

SEC. 813. ENFORCEMENT OF ORDERS FOR THE PAYMENT OF REPARATION.

(a) In case of violation of any order of the Commission for the payment of reparation, the person to whom such award was made may seek enforcement of such order in any United States district court having jurisdiction over the parties.

(b) In any United States district court, the findings and order of the Commission shall be prima facie evidence of the facts stated, and the petitioner shall not be liable for costs, nor for the costs of any subsequent stage of the proceedings unless they accrue upon the petitioner's appeal. A petitioner in a United States district court who prevails, shall be allowed a reasonable attorney's fee, to be assessed and collected as part of the costs of the suit.

(c) All parties in whose favor the Commission has made an award of reparation by a single order may be joined as plaintiffs, and all parties against whom such award has been made by a single order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against defendant liable to that plaintiff.

(d) No action seeking enforcement of any order for the payment of reparation may be filed later than 1 year from the date of the order.

SEC. 814. AUTHORITY TO SEEK INJUNCTION.

Whenever in the judgment of the Commission any person has engaged or is about to engage in any acts or practices which (1) constitute or will constitute a violation of any provision of this Act or any regulation or order issued thereunder, and (2) would result in substantial detriment to the foreign ocean commerce of the United States or would irreparably injure a common carrier by water or other person subject to this Act, the Commission may make application to an appropriate district court of the United States for an order enjoining such acts or practices, or for an order enforcing compliance with such provision or regulation. Upon a showing that the Commission has reasonable cause to believe that such a violation has been or is about to be committed, a temporary or permanent injunction or restraining order which the court deems just and proper shall be granted without bond, notwithstanding any other provision of law.

SEC. 815. RESIDENT AGENT.

Each common carrier by water and other person subject to this Act shall maintain a resident agent in the United States for purpose of service of process.

SEC. 816. GENERAL PENALTY.

Whoever violates any provision of this Act, except where a different penalty is provided, shall be subject to a civil penalty of not less than $5,000 nor more than $25,000 for each such violation.

SEC. 817. PENALTY FOR VIOLATION OF RULE OR ORDER.

Whoever violates any order, rule, or regulation of the Commission shall, except where a different penalty is provided, be subject to a civil penalty of not less than $1,000 nor more than $5,000 for each day such violation exists.

SEC. 818. CRIMINAL CONSPIRACY LIMITATIONS.

Notwithstanding any other provision of law, no fine or other punishment shall be imposed on any person for criminal conspiracy to violate any provision of this Act or to defraud the Commission by concealment of any such violation.

SEC. 819. AUTHORITY TO ASSESS OR COMPROMISE CIVIL PENALTIES.

(a) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act.

(b) Any civil penalty provided in this Act shall be assessed only after a formal proceeding under section 804 of this title. No such proceeding shall be commenced later than 5 years from the date when the violation occurred. In determining whether to commence a proceeding to assess penalties under this Act and in adjudicating the level of such penalties, the Commission shall not be influenced by the nationality of the person nor the flag of the vessel involved in the violations.

TITLE IX—INTERGOVERNMENTAL MARITIME AGREEMENTS

SEC. 901. CRITERIA FOR AGREEMENTS.

(a) No intergovernmental maritime agreement which provides or limits access to cargo in the foreign commerce or foreign trade of the United States shall be entered into by the United States Government, unless such agreement satisfies the following criteria:

(1) membership and participation are open at all times, and without unreasonable delays, to all United States-flag carriers applying to serve the trade;

(2) membership and participation are open at all times, and without unreasonable delays, to all reciprocal carriers applying to serve the trade, unless the reciprocal nation elects to limit the participation of its national carriers;

(3) the collective share of the United States-flag carriers is not less than the collective share of the reciprocal carriers;

(4) there is full and free competition among United States-flag carrier members of the agreement for liner cargo within the United States share if the

United States-flag carrier members, including any newly admitted member, are not in unanimous commercial agreement as to negotiated subshares;

(5) all common carriers by water in foreign commerce participating in the trade shall be subject to effective neutral body policing;

(6) there are no provisions in the agreement and no requirements of the reciprocal nation, which discriminate against, or limit entry by, or unreasonably inhibit or restrict operations of, any United States-flag carrier beyond limitations permitted under paragraphs (1) through (5) of this subsection; and

(7) there are no provisions in the agreement and no requirements of the reciprocal nation that are unjustly discriminatory to United States shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors.

(b) The provisions of subsection (a)(4) through (a)(7) of this section shall not apply to intergovernmental maritime agreements which cover the trades between the United States and Western Hemisphere nations with which the United States had in force on May 1, 1979, a Memorandum of Understanding or a Memorandum of Consultation concerning the maritime trades between that nation and the United States.

SEC. 902. MARITIME INDUSTRY ADVISORY COMMITTEE.

(a) The Secretary of Commerce shall establish a Maritime Industry Advisory Committee (hereinafter referred to as the "Committee") to advise the United States Government on the negotiation and implementation of intergovernmental maritime agreements. The Committee shall consist of at least nine members as follows: five members who have been nominated by United States-flag carriers; one member from an organization that represents United States shipboard labor; one member who is a United States importer; one member who is a United States exporter; and one member who represents a United States port. The Committee shall designate one of its members as Chairman.

(b) The Secretary of Commerce shall seek and give appropriate consideration to the recommendations and views of the Committee throughout the process of negotiating any intergovernmental maritime agreement.

(c) The Committee shall meet, at least quarterly, at the call of the Chairman, and shall submit, at least annually, a report to the Secretary of Commerce containing its recommendations and views on intergovernmental maritime agreements in force or which may be under consideration.

(d) The Committee may designate at least one representative to be a fully accredited member of each delegation of the United States Government to any international conference or meeting at which an intergovernmental maritime agreement is to be negotiated or considered.

(e) No funds may be expended to carry out the provisions of this section other than funds appropriated for fiscal years commencing after September 30, 1981.

SEC. 903. NEGOTIATION OF INTERGOVERNMENTAL MARITIME AGREEMENTS.

(a) Whenever national policies of other nations might operate to exclude or otherwise discriminate against United States-flag operators in reciprocal trades with the United States, intergovernmental maritime agreements shall be presumed to be in furtherance of the declaration of policy set forth in section 101 of this Act. The United States Government shall, therefore, undertake to negotiate and conclude such agreements where circumstances warrant. The Secretary of Commerce, as head of the lead agency, in consultation with the Secretary of State, shall be responsible for negotiating and concluding such agreements.

(b) Negotiation and conclusion of intergovernmental maritime agreements shall to the extent practicable, further the opportunity of United States-flag carriers to participate in the reciprocal nation's trades with countries other than the United States. The Secretary of Commerce, in consultation with the Secretary of State, shall be authorized to restrict or ban participation of national carriers of nations which fail to assure United States-flag carriers equivalent participation in that nation's trades with countries other than the United States.

SEC. 904. RELATIONSHIP TO OTHER LAWS.

Nothing in this title shall supersede the provisions of section 901 of the Merchant Marine Act, 1936 (46 U.S.C. 1241); the Military Ocean Transportation Act (10 U.S.C. 2631); of Public Resolution Numbered 17, Seventy-third Congress (48 Stat. 500), as amended.

TITLE X—CONFORMING AMENDMENTS; REPEALS

SEC. 1001. CONFORMING AMENDMENTS TO THE SHIPPING ACT, 1916.

(a) Section 1 of the Shipping Act, 1916 (39 Stat. 728; 46 U.S.C. 801) is amended to read as follows:

"That when used in this Act:

"The term 'board or Commission' means the Federal Maritime Commission as established by Reorganization Plan No. 7 of 1961.

"The term 'carrying on the business of forwarding' means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its territories, or possessions to foreign countries, or between such territories and possessions, and handling the formalities incident to such shipments.

"The term 'common carrier by water' means a person, whether or not actually operating a vessel, who holds himself out to engage in water transportation for hire as a public employment and undertakes to carry for shippers indifferently, but does not include one who holds himself out to engage in transportation by ferryboat or oceantramp.

"The term 'domestic offshore commerce' means ocean commerce between the contiguous United States and any of the following places or between or among any of the following places:

"(1) Alaska;

"(2) Hawaii;

"(3) Commonwealth of the Northern Marianas;

"(4) Commonwealth of Puerto Rico;

"(5) American Samoa;

"(6) Guam;

"(7) United States Virgin Islands; and

"(8) Other United States territories and possessions.

"The term 'independent ocean freight forwarder' means a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by a shipper or consignee or by any person having such beneficial interest.

"The term 'other person subject to this Act' means any person carrying on the business of freight forwarding or furnishing wharf, dock, warehouse, or other terminal facilities in connection with a common carrier by water in domestic offshore commerce.

"The term 'person' includes individuals, corporations, companies, associations, firms, partnerships, societies, joint stock companies, and the Government or any governmental agency of the United States, a State, territory, or possession thereof or of any foreign country.

"The term 'United States' includes the District of Columbia.

"The term 'maritime labor agreement' means any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group."

(b) Sections 18(a), 19, and 20 of the Shipping Act, 1916 (46 U.S.C. 817(a), 818, and 819), are amended by striking the word "interstate" each time it appears and substituting the words "domestic offshore".

(c) The title of the Shipping Act, 1916, (39 Stat. 728) is amended to read as follows: "An Act to regulate the domestic offshore commerce of the United States.".

SEC. 1002. TABLE OF REPEALED SECTIONS.

(a) The laws specified in the following table are repealed:

Shipping Act, 1916:	
14a	46 U.S.C. 813
14b	46 U.S.C. 813a
18(b)	46 U.S.C. 817(b)
26	46 U.S.C. 825
43	46 U.S.C. 841a
Merchant Marine Act, 1920:	
19	46 U.S.C. 867
20	46 U.S.C. 812
Merchant Marine Act, 1936:	
208	46 U.S.C. 1118
212(e)	46 U.S.C. 1122(e)
214	46 U.S.C. 1124

(b) Repeal of the laws set forth in subsection (a) of this section shall not affect any rights and duties that matured, penalties that were incurred or proceedings that were commenced before the date of enactment of this Act.

SEC. 1003. LAWS RELATING TO THE DOMESTIC OFFSHORE COMMERCE OF THE UNITED STATES.

(a) The Shipping Act, 1916, is amended by redesignating section 3, and all references thereto, as section 4 and inserting the following new section after section 2:

"SEC. 3. Commencing with the date of enactment of this section, the provisions of sections 4, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 29, 30, 31, 32, 33, 34, 35, and 44 of this Act shall be deemed to apply only to the domestic offshore commerce of the United States as defined in section 1 of this Act. Nothing in this section shall be construed to affect any rights or duties that matured, penalties that were incurred, or proceedings that were commenced prior to the date of enactment of this section.".

(b) Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 867) is amended by designating the existing language as subsection (a) and adding at the end thereof the following new subsection:

"(b) Commencing with the date of enactment of this subsection, the provisions of this section shall be deemed to apply only to the domestic offshore commerce of the United States as defined in section 1 of the Shipping Act, 1916 (46 U.S.C. 801). Nothing in this subsection shall be construed to affect any rights or duties that matured, penalties that were incurred, or proceedings that were commenced prior to the date of enactment of this subsection.".

(c) Section 205 of the Merchant Marine Act, 1936 (46 U.S.C. 1115) is amended by designating the existing language as subsection (a) and adding at the end thereof the following new subsection:

"(b) Commencing with the date of enactment of this subsection, the provisions of this section shall be deemed to apply only to the domestic offshore commerce of the United States as defined in section 1 of the Shipping Act, 1916 (46 U.S.C. 801). Nothing in this subsection shall be construed to affect any rights or duties that matured, penalties that were incurred, or proceedings that were commenced prior to the date of enactment of this subsection.".

(d) Section 18(c) of the Shipping Act. 1916 (46 U.S.C. 817(c)), and all references thereto, is redesignated as section 18(b).

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Senator GORTON. Senator Inouye.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. Thank you very much, Mr. Chairman.

Mr. Chairman, I'm pleased that the members of our subcommittee agree on the urgent need for reform of our laws regulating international liner shipping, and I believe the full committee shares our view. The hearings this week will add to the extensive record which the subcommittee has established over the past 5 years, and I would hope that we can move expeditiously to report legislation.

The problems are well known and documented. What remains is to reach agreement on the most effective way to correct them.

S. 125 is, of course, the successor to S. 2585, which was unanimously reported by the Commerce Committee and unanimously passed by the Senate with broad industry support last year.

More recently, on February 25 of this year, the FMC wrote to the chairman of the full committee expressing its strong support for S. 125. And I ask unanimous consent that a copy of the FMC's letter be inserted in the hearing record immediately following my statement.

Senator GORTON. Without objection

Senator INOUYE. At the personal request of the chairman of the subcommittee, my distinguished friend from Washington, I cosponsored his bill, S. 1593, to encourage a dialog, and with the understanding that both measures would receive equal consideration.

My sole objective is to assure that the Committee reports the best bill possible. The wide support which S. 125's predecessor received speaks for itself. However, if S. 1593, or any of the recommendations we received during the course of these hearings, can improve upon what the Senate unanimously did last year, I would hope that the committee will move quickly to adopt them.

[The letter referred to follows:]

FEDERAL MARITIME COMMISSION,
Washington, D.C., February 25, 1981.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the comments of the Federal Maritime Commission with regard to S. 125, a bill: To revise and codify the Shipping Act, 1916, and related laws.

This bill is the successor to S. 2585, which passed the Senate by unanimous consent during the 96th Congress. S. 2585 had our strong support which we now also extend to S. 125. We believe that this legislation represents both a comprehensive and reasoned approach to the reform and revision of the Shipping Act as it applies to the U.S. foreign commerce. One of the goals of S. 125 which is of major importance to the reform of maritime regulation is the clarification of the position of the Shipping Act vis-a-vis the U.S. antitrust laws. This legislation makes clear that the Shipping Act, as revised by the bill, is preeminent. In addition, of equal importance is that S. 125 embodies specific policy objectives intended by Congress to guide both the regulator and the regulated in implementing and adhering to the statutory scheme.

We note with approval that S. 125 differs with its predecessor bill in one important respect, namely that it incorporates the provisions of the newly enacted P.L. 96-325, the Maritime Labor Agreements Act of 1980, so as to prevent that Act's inadvertent repeal in the event that S. 125 becomes law.

As in the past, the Commission and its staff stand ready to assist the Committee with technical or substantive revisions to S. 125 that the Committee deems necessary. You can be assured of the Commission's support in this important and necessary work to update our current ocean shipping laws.

Commissioner Teige wishes me to state that he does not agree with the blanket approval of this legislation as stated in this letter and that he will submit to you and the committee his separate views on this bill.

Sincerely,

RICHARD J. DASCHBACH, *Chairman*.

Senator INOUYE. Mr. Chairman, I have a statement here from Senator Long from Louisiana, and without objection, may I have this inserted?

Senator GORTON. You may.

Senator INOUYE. Thank you very much.

[The statement follows:]

STATEMENT OF HON. RUSSELL B. LONG, U.S. SENATOR FROM LOUISIANA

Mr. Chairman: I strongly support the Committee's action in holding these hearings on S. 125 and S. 1593. I believe there is broad agreement in this Committee that revision of the laws regulating liner shipping deserves prompt attention.

S. 125 was introduced by Senator Inouye in the previous Congress as S. 2585 and was reported by the Committee unanimously last year and passed the Senate unanimously. Of the present Commerce Committee, only Senators Gorton, Stevens, and Kasten were not members when the Committee unanimously reported S. 2585, but Senator Stevens was a member of the Senate.

The Federal Maritime Commission, which will administer this legislation, strongly supported S. 2585 last year; and earlier this year before the new Chairman of the agency was appointed, the Commission formally endorsed S. 125. Thus, 3 of the 4 Commissioners presently sitting endorsed S. 125.

Last year most of the maritime industry also supported S. 2585 (now S. 125), while the Carter Administration opposed it.

S. 1593 introduced by Senator Gorton and cosponsored by Senators Stevens, Kasten and Inouye addresses many of the same problems facing our shipping industry. Both bills deserve thorough consideration.

Congress must move ahead rapidly to modernize the regulation of international liner shipping. I believe these hearings represent an outstanding beginning. Thank you.

Senator GORTON. Our first witness will be the Chairman of the Federal Maritime Commission, Hon. Alan Green. Mr. Green, you may proceed.

STATEMENT OF HON. ALAN GREEN, JR., CHAIRMAN, FEDERAL MARITIME COMMISSION, ACCOMPANIED BY C. JONATHAN BENNER, GENERAL COUNSEL; AND JAMES K. COOPER, MANAGING DIRECTOR

Mr. GREEN. Good morning. I am accompanied by my associates, our Managing Director, James Cooper, and our General Counsel, Jonathan Benner.

I am happy to appear before you this morning to present the views of the Federal Maritime Commission with regard to S. 1593 and S. 125. Before addressing the specific proposals for the reform of the Shipping Act, 1916, I think it is necessary to reflect a moment on the need for regulation in the shipping industry.

As you know, I have recently come to the Federal Maritime Commission after a long career in business. I like to think that my views on the subject of regulation are based on an appreciation of commercial realities. As a businessman, I firmly believe that competition, not direct Government regulation, achieves the most efficient allocation of labor and capital resources. Accordingly, I believe that the recent trend toward more competition and less direct

Government regulation is a healthy one. At the same time, I recognize that there are fundamental differences in the economic factors affecting the steamship industry and those applicable to industries which compete solely within the United States. Deregulation is based on the assumption that the antitrust laws will insure that each company within the deregulated industry will vigorously compete for business. This assumption breaks down in the area of international shipping because most foreign steamship lines play by a totally different set of rules than those imposed by our antitrust laws. Many of our trading partners have economic systems which are based on the premise that competition is wasteful and to be avoided.

It is naive to believe that the United States can impose its antitrust laws on such nations. Historically, the only feasible alternative has been to permit ocean common carriers in the foreign commerce to enter into agreements with other carriers to restrict or control competition without being fettered by the antitrust laws. Given this environment, we cannot simply abandon all direct Government regulation and rely solely on competition among ocean carriers to promote efficient allocation of resources. Our job, it seems to me, is to fashion a regulatory scheme which curbs the abuses which are inherent in an industry where competition is restricted or controlled by cartels or by other governments, but which imposes no undue administrative burden on those being regulated.

Before commenting on the specific provisions of the bills, I would like to express unanimous Commission support for objectives which have been identified by Senator Gorton in his introductory remarks on S. 1593. The Commission enthusiastically supports review of existing maritime regulatory statutes in order to clarify an antitrust exemption which becomes more cloudy and less useful with each passing day.

The Commission supports efforts to update and clarify tariff filing requirements for through intermodal traffic. The Commission supports a clear restatement of the authority of conferences of ocean carriers to offer the many benefits and advantages of through intermodal services to the shipping public. The Commission supports efforts to provide expeditious processing of agreements submitted for approval by the FMC. We support new regulatory measures which clearly distinguish between regulatory and promotional roles. Speaking more generally, Senators, the Commission applauds the significant efforts undertaken to carefully examine the 1916 Shipping Act and enact measures which bring that Act into conformity with shipping conditions of the late 20th century. The 1916 Shipping Act was good legislation but it has been stretched and pulled to its limit in order to accommodate new conditions.

In the time allowed this morning, I would like to touch upon the main issues presented by S. 1593 and S. 125. The Commission has previously commented on S. 125 and a quite similar predecessor bill, S. 2585. In my testimony today, I will not impose upon the committee's time by repeating in detail comments which have previously been submitted. We have in addition prepared, in letter form a more detailed analysis of many of the provisions of these bills containing our more technical comments. I ask that the analysis be included in the record as an attachment to my statement.

Senator GORTON. It will be so included.

Mr. GREEN. In my statement today, I intend to discuss a number of issues, beginning with the most important.

ANTITRUST IMMUNITY

A matter of tremendous concern to industry and government alike is defining with precision the scope of the antitrust immunity granted. The administration of the Shipping Act, 1916 has in recent years become bogged down in a wrangling over the boundaries of the immunity. This confusion has reached the point where steamship liner operators are at times beset by a commercial paralysis and cannot be expected to react quickly to changing trade conditions.

S. 1593 and S. 125 provide for a statutory grant of antitrust immunity for specified activities, in place of the current law which provides that the immunity attaches upon Commission approval of an agreement. This will make the penalties under the Shipping Act the only sanctions applicable to a violation and, consequently, end the uncertainty and confusion in the liner industry resulting from the dual application of the 1916 Shipping Act provisions and the antitrust laws. While this may clarify the application of the antitrust laws, there is a problem created by a lack of incentives to file agreements for approval. This is so because antitrust immunity will attach whether or not an agreement is filed. We therefore recommend that substantial penalties be established for failure to file an agreement.

A further problem with the scope of antitrust immunity under S. 1593 is the limitation of that immunity to agreements between or among common carriers to prevent, control or reduce competition "among themselves".

Most conference and other anticompetitive forms of agreements are designed to, and do have the effect of controlling or reducing outside competition. Therefore, this limiting language may make all such agreements once again vulnerable to attack under the antitrust laws, a result that seems contrary to the intent of both of these bills.

INTERMODAL AGREEMENTS

A particularly troublesome source of recent confusion has been a jurisdictional challenge to participation by steamship conferences in intermodal rates. The Commission's authority to grant section 15 approval for such arrangements is one which has always been thought clear and which has not been the cause of controversy until the past 4 or 5 years. Unfortunately, challenges to this use of section 15 authority have come at a time when through intermodal transportation is widespread and is providing American shippers with efficient and expeditious service in the foreign trades of the United States.

We strongly endorse the restatement and clarification of our intermodal authority to approve agreements among ocean carriers to discuss and agree among themselves upon intermodal rates.

In any measures dealing with a restatement of conference intermodal authority, it is necessary to identify clearly the activities which are being immunized from the antitrust laws. By striving for precision in this area, the Commission hopes that future expensive litigation can be avoided. In our detailed comments, we are proposing alternative language which enumerates the types of intermodal activity which would be permitted as part of the offering of intermodal services. We view the language of section 4(b) of S. 1593 as subject to varying interpretations. We recommend that any language dealing with intermodal agreements specify that negotiations with inland carriers subject to the regulation of the Interstate Commerce Commission must be undertaken by individual ocean carriers.

Conferences would be permitted to offer the intermodal service and quote a through rate covering both modes of transportation. However, it would be helpful in resolving potential interagency confusion if the bills avoid language which could be implied to permit conference carriers to negotiate as a collective unit with inland carriers. Such modifications should make it clear that the FMC would not regulate the rates and services of air carriers or surface carriers subject to the jurisdiction of the Interstate Commerce Commission.

STANDARDS FOR APPROVAL

If we are to expedite the regulatory process, we need clear and practical standards for Commission action. The Commission is not interested in ethereal, theoretical guideliness which do not reflect real-world conditions. We want definite standards which commercial parties and the Commission can apply in a sensible manner.

S. 1593 deletes from the existing agreement approval standards of section 15 of the Shipping Act the "public interest" standard. This deletion was presumably based upon a desire to terminate the so-called *Svenska* test which has been applied by the Commission since the mid-1960's. The holding of the *Svenska* decision was that agreements which provide for activity which is per se violative of the antitrust laws must be shown by proponents of the agreements to secure important public benefits, further valid regulatory purposes, or serve serious transportation needs. The Supreme Court reasoned that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest' unless other evidence in the record fairly detracts from the weight of this factor."

While some agreements have been disapproved based on application of *Svenska* standards, the deletion of the public interest language of section 15 of the Shipping Act may not resolve the issues sought to be addressed. We note that, under Commission case law prior to the public interest amendment of 1961, the effect of a proposed agreement on competition was considered under the unjust discrimination and detrimental to commerce standards.

We suggest that the bill or the legislative history clarify that Congress intends to legislatively overrule *Svenska* in regard to the shifting of the burden of proof, but does not intend to preclude the Commission from consideration of competition, apart from the antitrust laws in considering agreements. With this clarification and clear report language, we believe that the standards of "unjust discrimination" and "detriment to U.S. commerce," under section 6 of S. 1593 are sufficient to provide a meaningful screening of agreements prior to their implementation in U.S. commerce.

TIME LIMITS FOR ACTION ON AGREEMENTS

The Commission believes that it should complete its action on agreements as quickly and as efficiently as possible. If the time limits established by the bill for action on agreements (180 days plus a 90-day extension) are to work—and we want them to work—we believe that the initial filing by the proponents of an agreement should include, in addition to the text of the agreement itself, a statement setting out any significant background information with regard to the agreement's terms. Such an explanatory statement is imperative if the Commission is to provide a meaningful review of a proposed agreement within the time limits provided.

Otherwise critical days in the review process will be wasted in the Commission's seeking information from the parties as to the objectives of their agreement. A significant factor in the time it takes to process an agreement is the time consumed seeking information from proponents to explain the content and purpose of the agreement.

CONTINUING SURVEILLANCE OF AGREEMENTS

The Commission currently has the authority to evaluate an agreement already in operation to determine whether its implementation conforms with the law and whether the approval is still warranted by condition in the trade. S. 125 preserves this authority. S. 1593 does not specifically address the subject. Continuation of the Commission's authority to monitor the operation of agreements is crucial in view of the elimination of the Commission's authority to condition approval of an agreement for a particular term and the time restraints on the processing of agreements—which will mean fewer "in-depth" hearings into the projected effects of a particular agreement. We believe that the authority is too important not to be mentioned in the provisions of S. 1593.

REJECTION AUTHORITY

Section 5(d) of S. 1593 permits the Commission to reject agreements that fail to meet the standards listed in section 5(c). Summary rejection which gives no opportunity for hearing is only appropriate when the defect is apparent from the face of the document. The problem as we see it is that often compliance with these standards depends on issues of fact. Any attempt to deal with such factual issues through the rejection process without hearing will not comply with due process requirements.

TARIFFS

The filing of and adherence to tariffs is the backbone of a nondiscriminatory common carrier system. The public filing of tariffs is the means by which the law insures that the shipping public will receive ocean transportation service by common carriers on a nondiscriminatory basis. We thus endorse the continuation of the tariff filing system in the U.S. foreign commerce as provided for in both S. 1593 and S. 125.

Section 9 of S. 1593 requires only vessel-operating common carriers to file tariffs. We recommend that this requirement be made applicable to conferences and NVOCC's, as it is in present law and as it would continue to be under S. 125. There is essentially no distinction in the services provided by these two types of common carriers which would justify disparate tariff treatment. In addition, it is very important that the authority of the Commission under section 18(b)(4) of the Shipping Act to prescribe the form and manner of tariffs and to reject any tariff that fails to conform, be maintained in this legislation. Given the tremendous number of tariff pages that are filed with the Commission each year, the system would soon become unmanageable absent authority to prescribe the form of the system.

A final problem worth noting in this area is concern in some quarters that section 9 of S. 1593 may require the revelation of rail carrier rate divisions. Such a requirement might conflict with current ICC-practice which does not require rail carriers to publish these rates. The Federal Maritime Commission does not wish to expand its jurisdiction to reach the activities of the ICC-regulated surface carriers. Our agency has been engaged in a dialog with staff of the ICC, and we share their concern that this legislation not affect their jurisdiction.

REGULATION OF FREIGHT FORWARDERS

S. 1593 proposes the elimination of the licensing of freight forwarders, an increase in the required bond, and an end to the prohibition against a shipper acting as a forwarder for another. The Commission urges the committee to "proceed with caution" in this area. The regulatory scheme under section 44 of the Shipping Act, 1916, was established in response to widespread abuses in the freight forwarder industry. That law has proven successful in correcting those abuses. We are not aware that the regulation imposes an unnecessary burden on the forwarding industry. Unless such a result is evident, we recommend retention of the licensing requirement. We also recommend that S. 1593 maintain the existing system of permitting the Commission, by rule, to establish the amount of the bond, a method which allows for faster response to inflationary changes in our economy.

INTERGOVERNMENTAL MARITIME AGREEMENTS

The Commission believes that, in view of their foreign policy aspects an promotional overtones, the negotiation and content of intergovernmental maritime agreements are clearly the responsibility of the executive branch. We thus respectfully defer to the views of the spokesmen from the administration with regard to these agreements.

There is one further point which bears comment.

In introductory remarks to S. 1593, Senator Gorton addressed the issue of self-policing for independent carriers. The concept of applying self-policing for independents is appealing. If properly administered, it could be a useful adjunct to the Commission's enforcement program. There are, however a number of serious practical problems regarding implementation of the concept. We will listen carefully to the comments of witnesses during these hearings in this regard and will cooperate fully with the committee, should it be determined that legislation is required.

I have tried this morning to touch upon the main issues presented by these bills. I trust that this has been helpful to the committee, and I assure you that we at the Commission will make ourselves available to the committee and its staff for continuing consultations on this important legislation.

That concludes my prepared remarks. My associates and I would be happy to answer any questions that the committee may have. In view, however, of my relatively short tenure at the Commission, I would like to refer questions of a technical nature to my associates so that the committee may have the benefit of their expertise and experience. We have a team play, sir, at the FMC.

Thank you very much.

Senator GORTON. Thank you, Mr. Chairman. And you certainly can refer any of these questions to your staff when you wish to do so.

You have correctly characterized the difficulties that extraterritorial enforcement of our antitrust laws cause with our trading partners. Thus, a distinction must be drawn between methods of maintaining competition in the international transportation from those in domestic transportation.

In your view, are there unique characteristics in the shipping industry which would justify an antitrust exemption for economic reasons, aside from reasons of international relations?

Mr. GREEN. I would like to have our general counsel, Mr. Benner answer that.

Mr. BENNER. I think, Senator, that most of us who have had any experience at all with this industry realize that there are a number of factors which in their totality may make this industry quite unique.

I am not an economist, but we are all aware in watching this industry operate, that it is one which has high capital requirements, very high fixed costs. It has a very low ratio of marginal costs to average total cost in its operation. It has been plagued perennially with overtonnaging, waste of capacity.

There have been perennial price structure problems. And there are many aspects of the demand picture for the industry which are quite inelastic.

The problem though, I think, ultimately comes down—and these are theoretical considerations, but what compels the requirement for the antitrust exemption is the international nature of the industry.

We could talk for quite some time about these economic theories, and perhaps people more knowledgeable than I could expound upon them. But what we keep bumping into is the fact that we are trading with nations which do have somewhat different views on the role of competition in the liner industry.

Senator GORTON. So you think there are some economic reasons for it, but the international questions are overwhelming?

Mr. Benner. Yes.

Senator Gorton. It has been repeatedly asserted that the intervention of the Justice Department on antitrust grounds has prevented carriers, both United States and foreign, from operating in a coordinated manner as Congress intended, that it has chilled their initiatives and innovation, that it has especially inhibited U.S.-flag carriers, and that it has irritated our trading partners.

Do you, Mr. Chairman, agree that these have been the effects of actions of the Department of Justice over the last decade or so?

Mr. Green. I would say that is probably right. I think Mr. Benner should comment on this, but the Justice Department has its job to do, and I think they probably do it properly. But there has been a problem. This thing must be clarified, sir; but Mr. Benner may want to comment on that a little bit more.

Mr. Benner. I think that is the answer. The Justice Department has its responsibilities, and we have ours. And we recognize that problems which have developed come at the interface between the existing immunity under the shipping laws and where that immunity ceases to exist, and it is a rather gray area. There is a lot of friction around the edges of that immunity.

The approach of both bills is to eliminate that conflict at the boundary and try to establish a boundary that is broad enough and clear enough to prevent that kind of friction from occurring between the two departments.

I can tell you, Senator, as one who has at some point in his career operated as conference counsel, that there are many times when decisions are made not to undertake an action which is of commercial need, but where the antitrust implications are not clear and action is not taken at all. That is the kind of thing our testimony addresses and the sort of thing that both bills seems to address.

Senator Gorton. Even assuming that we properly clarified the antitrust immunity, the United States, by this Shipping Act, in one sense would still be unilaterally applying its laws to international shipping involving one or more other nations on any given trade route.

Will the Commission administer the Shipping Act if it is modified in the fashion reflected in these bills in a manner which is sensitive to the potential friction between the United States and its trading partners?

Mr. Green. Yes, sir.

Senator Gorton. How much time is generally required to approve an agreement now?

Mr. Green. I know the answer, but I will let Mr. Cooper answer that one.

Mr. Cooper. Depending upon the complexity of the agreement, Senator, the time varies. We are on a programed time frame now for our Bureau of Agreements to process agreements to the staff within 150 days after the filing of the agreement with the Commission.

Senator Gorton. Will the elimination of the public interest standard shorten that average time?

Mr. **Cooper**. I think it will depend upon the number of agreements that will subsequently be filed. But I think we can adhere to the time limits which have been proposed in the bill.

Senator **Gorton**. How often do you expect that you would require extension beyond the 180-day time limit?

Mr. **Cooper**. Again, I think, as the Chairman has touched upon in his statements, we have suggested that the agreements also contain, at the time of filing, a preparatory statement or a statement which covers the purpose of the agreements.

If the Commission does have some indication as to the nature—the purpose of the agreement, then I think that we can handle the agreements within the time frame provided.

Mr. **Green**. I would like to add just one thing, that a predecessor of mine, Chairman Daschbach, did a lot of very good work in this area. He shortened much of the time frame, and I think he should be so noted for the good job he did while he occupied my job.

Senator **Gorton**. Thank you.

Will the problems of the public interest test, as interpreted in the *Svenska* decision, be transported back into the approval process via the still rather subjective, open-ended standards, as S. 1593 retains from the 1916 act—that is, that no agreement be unjustly discriminatory or detrimental to the commerce of the United States, and should we therefore strive for standards of agreement that are even more certain than those two?

Mr. **Green**. That is what I want Mr. Benner to answer, sir.

Mr. **Benner**. In our testimony, and also in our detailed comments, we have stated our concern that if the intent in eliminating the public interest test is to completely avoid the type of problems which have occurred under *Svenska,* we may miss the mark slightly. Of course, a lot depends on how parties interpret the language of either bill.

But the fact of the matter is that in case law, prior to the insertion of the public interest standard in 1961, we would sometimes see antitrust analysis creep into the Commission's decision under the detrimental to commerce or nondiscrimination clauses.

So, what we have suggested—and our detailed comments elaborates on this in some detail, and you may wish to study that—is that we get very clear language as to the intent of Congress on whether any antitrust analysis is to take place at all.

We assume that there will always be some analysis relating to competition generally, but we do think it is the intent of the committee that antitrust analysis be removed from the scene.

Senator **Gorton**. Have you reflected at all on what sort of factors the Commission will consider in determining whether an agreement, should this new act pass, is detrimental to commerce or unjustly discriminatory?

Mr. **Benner**. Well, I think we just have to take that as it goes along. There is a body of law that does define those other terms which are a part of the 1916 act, and I assume that would continue to be in place. But the procedure for agreements is such a case-by-case happening that we probably should not try to indulge in advance examples of particular agreements or particular standards we would use.

Senator GORTON. Is there a possibility that any agreement to submit an explanatory statement when initially filing an agreement will evolve into a requirement to justify the agreement, which is tantamount to meeting a certain degree of burden of proof? Or alternatively, should the explanatory statement be limited to a statement of the objectives of the agreement?

Mr. BENNER. I think that is a legitimate concern that people might have. I think the section of the bill which deals with burden of proof pretty much prevents that from happening. Justification is something of a word of art that refers to the impact of the *Svenska* test. And I think both bill resolve that problem.

Senator GORTON. Please give examples of situations requiring cancellation of agreements already in effect by the Commission now.[1]

Mr. BENNER. Of course, once an Agreement is set in motion, the environment in which it was originally created may change. And I suppose a specific example of where the Commission has felt that that might happen would be something like Agreement 8765, which is reported at 9 FMC 333. There are others. The general point that is being made on the matter of continuing surveillance or authority to examine an agreement after it is approved is that agreements, like everything else, can outlive their usefulness. And it is our position that there should be some mechanism for monitoring that kind of situation.

Senator GORTON. If an agreement is acceptable on its face, and therefore approved, but its implementation proceeds out of conformity with the act, is the appropriate solution a cancellation or modification of the Agreement or a civil penalty for the prohibited activity, or both, or either, under differing circumstances?

Mr. BENNER. I think the Commission view is that cancellation of the agreement is the better approach. A lot depends upon how severe the penalties are and how the Commission applies them. We would not want to see a situation where an agreement which operates in violation of the act continues to run on something of a licensing fee basis, where businessmen just decide that penalties are acceptable and would continue to make the decision to operate and incur the penalties.

We think there should be some authority to terminate the agreement or modify the agreement if it is an ambiguity that is giving rise to that conduct.

Senator GORTON. Is the requirement that a conference establish commercially reasonable criteria for membership too subjective? Will it serve any good purpose?

Mr. BENNER. Well, as the chairman indicated, we are very concerned that it is too subjective—at least as a rejection standard. We are very concerned that the goal of expediting the agreement approval process may run into snags if we are exercising somewhat judgmental values in rejecting, right off the bat, agreements that are filed.

We expect—and I look forward to having to litigate that kind of issue.

Senator GORTON. Why do you believe that non-vessel-operating common carriers, marine terminal operators, and freight forwarders should file agreements and receive antitrust immunity? Why not limit it to the activities to two or more ocean common carriers?

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[1] See p. 459.

Mr. GREEN. I think the reason essentially, Mr. Chairman, is because there really isn't any distinction between the two. And they need the regulation, to be treated the same.

Would you agree with that, Jon?

Mr. BENNER. Yes.

Well, you might want to split them up, and I think our comments will go into this in some detail. But an NVO, in our eyes, really can't be distinguished, for regulatory purposes, from a vessel-operating common carrier. Obviously, their functions are somewhat different. The terminal operator is different. But these people or entities sit in chain so close to the movement of commerce that, if you are carving out antitrust immunities for one segment, we think it best that the circle be drawn large enough to include these other entities who are very much related to the vessel-operating common carrier services.

Senator GORTON. Should the activities for which the act would require approval of an agreement, but for an exemption by the Commission under section 17 of S. 1593, be given antitrust immunity?

Mr. BENNER. Could you rephrase the question or repeat it, please?

Senator GORTON. Should exempt activities get antitrust immunity as well?

Mr. BENNER. Oh, I see. I understand.

It has always been our position under the current law that an exempt activity, if the Commission decides to exempt it from the approval process of the current section 15, is still very much subject to the antitrust laws. The parties act at their own peril in determining whether they wish to go through the Commission's approval process.

I think under both bills the antitrust immunity has been drawn broadly enough that a different analysis would have to apply.

Senator GORTON. Well, we are asking for your comment on whether or not it is appropriate.

Mr. BENNER. Well, I think it depends on whether the Congress wants the Commission to be screening these agreements at all for any kind of antitrust impact. If it does, then an exempt activity just would not have the discipline attached to it of being subject to antitrust laws. So we probably would really have to make a basic philosophical and policy decision as to whether exempt activities should have any antitrust analysis at all.

Senator GORTON. It seems, from your comments, that you have, at least to a certain extent, consulted with the Interstate Commerce Commission on this proposal. What is that Commission's position on conference authority to establish intermodal through rates and services? And do you expect any friction or confusion with the ICC? Or are your remarks designed to create amendments which would prevent that friction?

Mr. GREEN. One thing that I have done since coming aboard is to try to work with as many of the various committees and commissions which interact with us and, in particular, the ICC. We have been over there; they have been over to our place. And I think that there has developed—I like to use the words "team play effort" to bring this legislation forward.

And I think that the ICC hopefully certainly is in total agreement with what we have testified to today.

Mr. BENNER. We are not at liberty to state an ICC position, of course, and they certainly—their comments should be sought if the concerns are held about their position. But we have been trying to be careful to be aware of their views and to coordinate the development of opposition with their concerns.

Senator GORTON. Does the Commission have any reaction to the amendment passed in the Omnibus Budget Reconciliation Act that would permit a freight forwarder to arrange a shipment of cargo in which it has beneficial interest so long as it receives no compensation?

Mr. GREEN. I'm going to ask Mr. Cooper to answer that, please.

Mr. COOPER. That amendment reverses 20 years of regulation concerning this part of the act, Senators. We have, through our field representatives and through conversations that members of the staff have had with members of the freight forwarding industry, received indications that they do not support this recent amendment to the statute. We are mandated by the amendment to come back with a report to the Congress, I believe it is by June of 1983, concerning what problems we may be facing in the enforcement aspects of this particular legislation.

Senator GORTON. Do you expect to have some problems?

Mr. COOPER. I think we will; yes, sir.

Senator GORTON. What sort of penalties should be imposed for failure to file an agreement or for operating before it is approved?

Mr. BENNER. We just want them to be of a caliber that will get the attention of the parties to these agreements. As the chairman pointed out in his statement, the concern here is that if there is a broad antitrust immunity stated in the statute, one thing that we can say quite certainly is that we have lost the incentive effect of the applicability of the antitrust laws to file agreements. That is a fairly effective incentive. I think a lot of parties file agreements at the Commission which may or may not be subject to section 15, or may or may not be antitrust violations—just so that they don't take chances. We will be losing this, so we would want to be sure that the penalties are sufficiently severe that parties would see some reason to file an agreement with the Commission. Otherwise we will have a very difficult enforcement problem under the prohibited acts section.

Senator GORTON. Finally, a fairly specific and a much more general question: Why is it necessary that all shippers, regardless of the volume which they ship, should receive the same rate as is published in the tariff? And more generally, given our move toward deregulation, why should we require publishing of tariffs or filing of tariffs at all, and might we not simply allow this to be subject to competition in a competitive economy?

Mr. GREEN. Well, our feeling is that from the standpoint of the shipper, the tariff system, as now devised, protects the small shipper and we think it is the fairest system that has been put forward.

Do you have anything you want to add to that?

Mr. **Cooper**. Senator, under our laws, the providers of ocean transportation services to the general public are operating as common carriers, and as such, they are obliged to treat shippers in a nondiscriminatory manner concerning the rates they charge. The filing of tarrifs insures that the shippers will be charged the published rate. It insures in some aspect fair competition on the part of both the carriers and the shippers alike, and discourages, to a large extent, the predatory economic competition between carriers which is serving a particular trade.

Senator **Gorton**. That is a good statement on the general theory of common carriers. But as you well know, that theory has been substantially changed in the field of air travel and motor carrier travel and train transportation. Should we be looking to some analogous changes in the field of shipping?

Mr. **Benner**. I think that perhaps the time is a good one to be analyzing some of those assumptions. We feel rather strongly that in the international environment, when you are speaking of the movement of commodities back and forth, that the tariff system, in addition to the philosophical features and policy features that Mr. Cooper has identified, makes it possible for American shipping interests, small shippers and large shippers alike, to operate in a very predictable and reasonable export climate. They know what their transportation costs are going to be over a 30-day period. They are not subject to any lack of price flexibility.

We feel that the tariff system, as it now stands, does have very good provision for downward movement of prices and we think that some of these features distinguish this area from the domestic market. I imagine we will hear more on this as these proceedings continue.

Senator **Gorton**. I imagine we will, and it would be appropriate for you to comment further as well.

Senator Inouye.

Senator **Inouye**. Thank you, Mr. Chairman.

I would like to, Mr. Chairman, proceed with a very broad, general question. We know that these provisions affect the interest of American citizens and American corporations, but we also know that they apply to foreign interest and foreign corporations and foreign governments. Oftentimes, in drafting these provisions, whether this bill or other bills, we seem to assume that all of the interests involved, foreign and domestic, play the game according to the same rules, and we know that's not so. We have antitrust laws, we have antirebating laws, we have OSHA rules, et cetera.

How many countries do you sincerely believe have laws that are equal to the United States, or give our people the same breaks that they give their people?

Mr. **Green**. I would say none, sir.

Senator **Inouye**. Would you clarify, sir?

Mr. **Green**. Well, I can't think of any. As I have often stated, I really don't see why Americans should be penalized for being Americans. I want to see, according to the statutes, that the foreign carriers, the people who do business in foreign commerce, are treated equally to the Americans. And I just don't think that any other country quite worries about their foreign trading partners and how well they do, the way we Americans do. We want to see the others do well.

I have said to many people who have made courtesy calls on me that I want to see them, both foreign and domestic carriers make a fair profit; and I do, sir. In a way, I realize that our laws cannot or should not affect the conduct and operations of foreign vessels within their waters or within their confines.

Senator INOUYE. But don't you think the laws here should be equally applied to all foreign and domestic?

Mr. GREEN. The answer to that is yes, sir.

Senator INOUYE. Do you believe that our laws are equally applied?

Mr. GREEN. Do I feel they are equally applied now? Well, I've only been there since July 1, but I think they have been equally applied since July 1, yes. I will put it that way, I think so.

Mr. Benner, you are the attorney. Would you like to answer that question?

Mr. BENNER. Well, attorneys often can't assure that laws are equally applied, but I think the intent is there. I think that the people who are at least applying the maritime regulatory laws have endeavored, as best they can, to assure equal treatment to both foreign flag and U.S.-flag operators. In a sense, that is the only comfortable position a regulator can be in and we have tried very hard to do that over the history of the agency. It would probably be fatuous to say that we always succeeded, but I know very well that has been the intent.

Senator INOUYE. I realize that your jurisdiction applies to a limited portion of the activities of the merchant marine industry, but I am taking the totality of it. Do you believe that, specifically, one, that the OSHA laws are applied equitably?

Mr. BENNER. I really could not speak to that, Senator.

Mr. GREEN. I'm sorry, I can't either.

Senator INOUYE. How about the safety and health rules?

Mr. COOPER. Well, I don't think I could respond to that, Senator. I am totally unfamiliar with them.

Senator INOUYE. The building specification rules, are they applied to all ships that come into our harbors?

Mr. COOPER. Again, that is an area, Senator, which I personally am not familiar with.

Senator INOUYE. Do you believe they are equally administered?

Mr. COOPER. I don't know. I think they should be.

Senator INOUYE. Do you believe that our antirebating laws are equally administered?

Mr. COOPER. They are equally administered by the Federal Maritime Commission. At least, we strive to implement the antirebate statutes as uniformly as possible; yes, sir.

Senator INOUYE. What about your brother agency, the Justice Department?

Mr. COOPER. I really don't know what the Justice Department's theory of application of their responsibilities are. I think in the area of the antirebating statutes or the rebating problems in general, they probably would be leaving that up to the FMC to enforce.

Senator INOUYE. As the primary agency concerned with the regulation of shipping in the U.S. liner trades, do you believe that you should be concerned with what other agencies do?

Mr. GREEN. Yes, sir, I do.

Senator INOUYE. Could you have someone look into the laws of the United States to determine if, in fact, our laws are equally applied to domestic and foreign interests?

Mr. GREEN. Would you mind repeating that question, sir? I'm sorry I missed the thrust.

Senator INOUYE. We won't need a very in-depth study, but I think the record should show if, in fact, there are differences in the application of our laws as they concern foreign and domestic interest; and if there is, and if our interests are placed at uneven odds, unfair odds, then something should be done.

Mr. GREEN. Yes, we certainly will look at that.[1]

Senator INOUYE. Mr. Chairman, I've listened to your statement very carefully and I note that you have responded to just about every problem, but I'm not quite clear on one. Open and closed conferences; what are your thoughts there? One bill, S. 125, has the open-conference system. The other has a closed-conference system. Which do you prefer?

Mr. GREEN. Well, we feel that S. 1593 is a kind of semi-closed system. It is not exactly closed, the way I would interpret a closed system to be, say, in business. We really haven't taken that strong a position on that, frankly. We would like to listen to the testimony ourselves from others.

Senator INOUYE. Don't you believe that is a very important provision?

Mr. GREEN. Yes, sir, I do.

Senator INOUYE. I would appreciate the views of the agency because who knows, we may pass a measure and the President of the United States might decide to veto it just because of that one provision.

Mr. GREEN. Well, I wouldn't want that to happen. We will get you a position, sir.[1]

Senator INOUYE. As I read section 13(a) of S. 1593, entities such as labor organizations and ports would be precluded from filing complaints alleging a violation of these provisions. Under the present law, they may file complaints and have done so. Is my interpretation correct?

Mr. GREEN. Yes, sir, your interpretation is correct. They should be allowed to.

Senator INOUYE. Do you agree with section 13(a) of the bill, of S. 1593?

Mr. GREEN. No, sir. As you point out, there have been numerous complaints in the past and these entities are an important part of our maritime commerce. They should be in a position to have their voices heard.

Senator INOUYE. I have about 30 questions. Most of them would require rather detailed responses. Mr. Chairman, might I submit to you and your agency these questions?

Mr. GREEN. You certainly may, sir.

Senator INOUYE. Thank you very much.

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[1] See p. 459.

Senator GORTON. I, also, will have several questions for you to address. We thank you for your help here today and we will be seeing you frequently in the future.

Mr. GREEN. Fine. Thank you, sir.

[The statement follows:]

STATEMENT OF HON. ALAN GREEN, JR., CHAIRMAN, FEDERAL MARITIME COMMISSION

Good Morning. I am happy to appear before you this morning to present the views of the Federal Maritime Commission with regard to S. 1593 and S. 125. Before addressing the specific proposals for the reform of the Shipping Act 1916, I think it is necessary to reflect a moment on the need for regulation in the shipping industry.

As you know, I have recently come to the Federal Maritime Commission after a long career in business. I like to think that my views on the subject of regulation are based on an appreciation for commercial realities. As a businessman, I firmly believe that competition, not direct government regulation, achieves the most efficient allocation of labor and capital resources. Accordingly, I believe that the recent trend toward more competition and less direct government regulation is a healthy one. At the same time, I recognize that there are fundamental differences in the economic factors affecting the steamship industry and those applicable to industries which compete solely within the United States. Deregulation is based on the assumption that the antitrust laws will ensure that each company within the deregulated industry will vigorously compete for business. This assumption breaks down in the area of international shipping because most foreign steamship lines play by a totally different set of rules than those imposed by our antitrust laws. Many of our trading partners have economic systems which are based on the premise that competition is wasteful and to be avoided. It is naive to believe that the United States can impose its antitrust laws on such nations. Historically, the only feasible alternative has been to permit ocean common carriers foreign commerce to enter into agreements with other carriers to restrict or control competition without being fettered by the antitrust laws. Given this environment, we cannot simply abandon all direct government regulation and rely solely on competition among ocean carriers to promote efficient allocation of resources. Our job, it seems to me, is to fashion a regulatory scheme which curbs the abuses which are inherent in an industry where competition is restricted or controlled by cartels or by other governments, but which imposes no undue administrative burden on those being regulated.

Before commenting on the specific provisions of the bills, I would like to express unanimous Commission support for objectives which have been identified by Senator Gorton in his introductory remarks on S. 1593. The Commission enthusiastically supports review of existing maritime regulatory statutes in order to clarify an antitrust exemption which becomes more cloudy and less useful with each passing day. The Commission supports efforts to update and clarify tariff filing requirements for through intermodal traffic. The Commission supports a clear restatement of the authority of conferences of ocean carriers to offer the many benefits and advantages of through intermodal services to the shipping public. The Commission supports efforts to provide expeditious processing of agreements submitted for approval by the FMC. We support development of realistic and more definite standards for action on agreements. We support new regulatory measures which clearly distinguish between regulatory and promotional roles. Speaking more generally, Senators, the Commission applauds the significant efforts undertaken to carefully examine the 1916 Shipping Act and enact measures which bring that Act into conformity with shipping conditions of the late Twentieth Century. The 1916 Shipping Act was good legislation but it has been stretched and pulled to its limit in order to accommodate new conditions.

In the time allowed this morning, I would like to touch upon the main issues presented by S. 1593 and S. 125. The Commission has previously commented on S. 125 and a quite similar predecessor bill, S. 2585. In my testimony today, I will not impose upon the Committee's time by repeating in detail comments which have previously been submitted. We have in addition prepared, in letter form, a more detailed analysis of many of the provisions of these bills containing our more technical comments. I ask that the analysis be included in the record as an attachment to my statement.

In my statement today, I intend to discuss a number of issues, beginning with the most important:

ANTITRUST IMMUNITY

A matter of tremendous concern to industry and government alike is defining with precision the scope of the antitrust immunity granted. The administration of the Shipping Act, 1916 has in recent years become bogged down in a wrangling over the boundaries of the immunity. This confusion has reached the point where steamship liner operators are at times beset by a commercial paralysis and cannot be expected to react quickly to changing trade conditions.

S. 1593 and S. 125 provide for a statutory grant of antitrust immunity for specified activities, in place of the current law which provides that the immunity attaches upon Commission approval of an agreement. This will make the penalties under the Shipping Act the only sanctions applicable to a violation and, consequently, end the uncertainty and confusion in the liner industry resulting from the dual application of the 1916 Shipping Act provisions and the antitrust laws. While this may clarify the application of the antitrust laws, there is a problem created by a lack of incentives to file agreements for approval. This is so because antitrust immunity will attach whether or not an agreement is filed. We therefore recommend that substantial penalties be established for failure to file an agreement.

We note that, under the terms of section 4 of S. 1593, antitrust immunity would only extend to agreements between or among vessel operating common carriers or to shippers' councils agreements. This is a much narrower scope than the current section 15 which covers agreements to which non-vessel operating common carriers, marine terminal operators and independent ocean freight forwarders are parties. Of the total of 315 agreements that were filed for approval in 1980, 136 were filed by persons other than ocean common carriers. Where the functions of entities other than vessel operating common carriers are essentially the same or closely related to the provision of common carrier services, the Commission believes that access to antitrust immunity must be present. This is consistent with current law and is essential to give meaning to the antitrust immunity granted vessel operating common carriers. At the very least, the immunity granted to approved agreements by the Shipping Act, 1916 should be preserved and not eliminated.

A further problem with the scope of antitrust immunity under S. 1593 is the limitation of that immunity to agreements between or among common carriers to prevent, control or reduce competition "among themselves" (section 4(a)(6)). Most conference and other anticompetitive forms of agreements are designed to, and do have the effect of controlling or reducing outside competition. Therefore, this limiting language may make all such agreements once again vulnerable to attack under the antitrust laws, a result that seems contrary to the intent of both of these bills.

INTERMODAL AGREEMENTS

A particularly troublesome source of recent confusion has been a jurisdictional challenge to participation by steamship conferences in intermodal rates. The Commission's authority to grant section 15 approval for such arrangements is one which we have always thought clear and which has not been the cause of controversy until the past four or five years. Unfortunately, challenges to this use of section 15 authority have come at a time when through intermodal transportation is widespread and is providing American shippers with efficient and expeditious service in the foreign trades of the United States.

There is now pending in the United States Court of Appeals for the District of Columbia Circuit a case entitled *United States of America* v. *Federal Maritime Commission*. The Commission's position was upheld by a panel decision. The proceeding is being reheard by the full court. Should the Commission and the Court's earlier decision be reversed, conference participation in intermodal rates would be terminated. The Commission has clearly stated its position to the Court that it knows of no Congressional intent to limit intermodal services to non-conference carriers. Despite our view that existing law is clear on this point, we expect that the issue will arise again and again unless clarified by legislation or by a definitive Court decision. For this reason, we strongly endorse the restatement and clarification of our intermodal authority to approve agreements among ocean carriers to discuss and agree among themselves upon intermodal rates.

In any measures dealing with a restatement of conference intermodal authority, it is necessary to identify clearly the activities which are being immunized from the antitrust laws. By striving for precision in this area, the Commission hopes that future expensive litigation can be avoided. In our detailed comments, we are proposing alternative language which enumerates the types of intermodal activity which would be permitted as part of the offering of intermodal services. We view the language of section 4(b) of S. 1593 as subject to varying interpretations. We recommend that any language dealing with intermodal agreements specify that negotiations with inland carriers subject to the regulation of the Interstate Commerce Commission must be undertaken by individual ocean carriers. Conferences would be permitted to offer the intermodal service and quote a through rate covering both modes of transportation. However, it would be helpful in resolving potential interagency confusion if the bills avoid language which could be implied to permit conference carriers to negotiate as a collective unit with inland carriers. Such modifications should make it clear that the FMC would not regulate the rates and services of air carriers or surface carriers subject to the jurisdiction of the Interstate Commerce Commission.

STANDARDS FOR APPROVAL

Critical to any legislation which attempts to expedite the regulatory process and provide clear and predictable benchmarks for agreements, are clear and practical standards for Commission action. The Commission is not interested in ethereal, theoretical guidelines which do not reflect real-world conditions. We want definite standards which commercial parties and the Commission can apply in a sensible manner.

S. 1593 deletes from the existing agreement approval standards of section 15 of the Shipping Act the "public interest" standard. This deletion was presumably based upon a desire to terminate the so-called "*Svenksa*" test which has been applied by the Commission since the mid-1960's. The holding of the *Svenska* decision was that agreements which provide for activity which is per se violative of the antitrust laws must be shown by proponents of the agreements to secure important public benefits, further valid regulatory purposes, or serve serious transportation needs. The Supreme Court reasoned that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contarary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." While many agreements have been disapproved based on application of *Svenska* standards, the deletion of the public interest language of section 15 of the Shipping Act may not resolve the issues sought to be addressed. We note that, under Commission case law prior to the "public interest" amendment of 1961, the effect of a proposed agreement on competition was considered under the "unjust discrimination" and "detrimental to commerce" standards. We suggest that the bill or the legislative history clarify that Congress intends to legislatively overrule *Svenska* in regard to the shifting of the burden of proof, but does not intend to preclude the Commission from consideration of competition, apart from the antitrust laws, in considering agreements. With this clarification and clear report language, we believe that the sandards of "unjust discrimination" and "detriment to U.S. commerce" under section 6 of S. 1593 are sufficient to provide a meaningful screening of agreements prior to their implementation in U.S. commerce.

TIME LIMITS FOR ACTION ON AGREEMENTS

The Commission believes that it should complete its action on agreements as quickly and as efficiently as possible. If the time limits established by the bill for action on agreements (180 days plus a 90-day extension) are to work—and we want them to work—we believe that the initial filing by the proponents of an agreement should include, in addition to the text of the agreement itself, a statement setting out any significant background information with regard to the agreement's terms. Such an explanatory statement is imperative if the Commission is to provide a meaningful review of a proposed agreement within the time limits provided. Otherwise, critical days in the review process will be wasted in the Commission's seeking information from the parties as to the objectives of their agreement. A significant factor in the time it takes to process an agreement is the time consumed seeking information from proponents to explain the content and purpose for the agreement.

CONTINUING SURVEILLANCE OF AGREEMENTS

Commission currently has the authority to evaluate an agreement already in operation to determine whether its implementation conforms with the law and whether the approval is still warranted by conditions in the trade. S. 125 preserves this authority (section 307(c)). S. 1593 does not specifically to address the subject. The Continuation of the Commission's authority to monitor the operation of agreements is crucial in view of the elimination of the Commission's authority to condition approval of an agreement for a particular term and the time restraints on the processing of agreements (which will mean fewer "in-depth" hearings into the projected effects of a particular agreements). We believe that the authority is too important not to be mentioned in the provisions of S. 1593.

REJECTION AUTHORITY

Section 5(d) of S. 1593 permits the Commission to reject agreements that fail to meet the standards listed in section 5(c). Summary rejection which gives no opportunity for hearing is only appropriate when the defect is apparent from the face of the document. The problem as we see it is that often compliance with these standards depends on issues of fact. Any attempt to deal with such factual issues through the rejection process without hearing will not comply with due process requirements.

TARIFFS

The filing of and adherence to tariffs is the backbone of a nondiscriminatory common carrier system. The public filing of tariff is the means by which the law ensures that the public will receive ocean transportation service by common carriers on a nondiscriminatory basis. We thus endorse the continuation of the tariff filing system in the U.S. foreign commerce by both S. 1593 and S. 125.

Section 9 of S. 1593 requires only vessel-operating common carriers to file tariffs. We recommend that this requirement be made applicable to conferences and NVOCC's as it is in present law and as it would continue to be under S. 125. There is essentially no distinction in the services provided by these two types of common carriers which would justify disparate tariff treatment. In addition, it is very important that the authority of the Commission under section 18(b)(4) of the shipping act to prescribe the form and manner of tariffs and to reject any tariff that fails to conform, be maintained in this legislation. Given the tremendous number of tariff pages that are filed with the Commission each
unmanageable absent authority to prescribe the form of the system.

Relative to the matter of tariffs, the Commission is on record as supporting the requirement for a uniform tariff filing system for carriers offering intermodal services for U.S. import/export cargo regardless of whether the carrier utilizes a United States port or a port of a contiguous nation. The Commission asserted this postion in the "*ACE*" case. The Court there, however, declined to follow the Commission's interpretation of the Shipping Act with regard to this matter, and instead opined that a legislative solution would be more appropriate. S. 1593 does not address this issue while S. 125 does through its definition of "common carrier by water in foreign commerce" (section 102(5)). The commission favors the free movement of United States export/import commerce on a competitive and nondiscriminatory basis as well as equal regulatory treatment of all operators, and therefore recommends that consideration be given to this issue.

A final problem worth noting in this area is concern in some quarters that section 9 of S. 1593 may require the revelation of rail carrier rate divisions. Such a requirement might conflict with current ICC practice which does not require rail carriers to publish these rates. The Federal Maritime Commission does not wish to expand its substantive jurisdiction to reach the activities of the ICC regulated surface carriers. Our agency has been engaged in a dialogue with staff of the ICC and we share their concern that this legislation not substantively affect their jurisdiction.

REGULATION OF FREIGHT FORWARDERS

S. 1593 proposes the elimination of the licensing of freight forwarders, an increase in the required bond, and an end to the prohibition against a shipper acting as a forwarder for another. The Commission urges the Committee to "proceed with caution" in this area. The regulatory scheme under section 44 of the Shipping Act, 1916, was established in response to widespread abuses in the freight forwarder industry. That law has proven successful in correcting those abuses. We are not aware that the regulation imposes a unnecessary burden on the forwarding industry. Unless such a result is evident, we recommend retention of the licensing requirement. We also recommend that the S. 1593 maintain the existing system of permitting the Commission, by rule, to establish the amount of the bond, a method which allows for faster response to inflationary changes in our economy.

PROHIBITED ACTS

For a detailed discussion of the prohibited acts provisions of S. 1593 we refer you to technical comments contained in our letter. I would like to briefly note that the sections of the Shipping Act, 1916 which cover prohibited acts are currently operating well and are noncontroversial, as far as we can ascertain. There is a body of law that has developed over the years concerning their implementation and interpretation. We suggest that the language of these sections be maintained in their current form or as recodified in S. 125 to avoid any unnecessary litigation in the future.

INTERGOVERNMENTAL MARITIME AGREEMENTS

The Commission believes that, in view of their foreign policy aspects and promotional overtones, the negotiation and content of intergovernmental maritime agreements are clearly the responsibility of the Executive Branch. We thus respectfully defer to the views of the spokesmen from the Administration with regard to these agreements.

There is one further point which bears comment.

In introductory remarks to S. 1593, Senator Gorton addressed the issue of self-policing for independent carriers. The concept of applying self-policing for independents is appealing. If properly administered it could be a useful adjunct to the Commission's enforcement program. There are, however, a number of serious practical problems regarding implementation of the concept. We will listen carefully to the comments of witnesses during these hearings in this regard, and will cooperate fully with the Committee should it be determined that legislation is required.

CONCLUSION

I have tried this morning to touch upon the main issues presented by these bills. I trust that this has been helpful to the Committee and I assure that we at the Commission will make ourselves available to the Committee and its staff for continuing consultations on this important legislation.

That concludes my prepared remarks. I would be happy to answer any questions that the Committee may have.

ATTACHMENT

FEDERAL MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., September 21, 1981.

Hon. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine, Room 126, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR GORTON: As a supplement to my prepared statement before your Subcommittee on S. 1593, the "Shipping Act of 1981," the Federal Maritime Commission would like to take this opportunity to submit a more detailed analysis of the provisions of the bill. While my statement does discuss the major issues involved with this legislation, in light of the time constraints and the nature of the oral hearing, we felt that our more technical comments would be an appropriate subject for a letter. In the interest of clarity, we have organized our comments around subject headings and have numbered the paragraphs for ease in cross referencing certain provisions. I would like to emphasize that the Commission has made this analysis in furtherance of our shared objectives—to achieve a legislative proposal that clearly sets out the regulatory requirements placed upon common carriers by water in our foreign commerce and other persons subject to the Act and that clearly delineates the Commission's statutory functions and responsibilities. We will focus our comments on the provisions of S. 1593, but will reference the sections of S. 125, where applicable.

Sec. 3.—Definitions

(1) It is our understanding that the provisions of P.L. 96-325 were inadvertently omitted from the text of S. 1593. In order to take account of that law, we suggest that the definition of "agreement" should exclude "maritime labor agreements." In addition, the definitions of "assessment agreement" and "maritime labor agreement" should be separately defined. These definitions appear in S. 125 (sections 102 (2) and (15)). We suggest the following language:

(1) "Agreement" means understandings, arrangements and associations, written or oral, and any modification or cancellation thereof, but does not include maritime labor agreements;

(2) "Assessment agreement" means an agreement or any provision of an agreement, whether part of a collective-bargaining agreement or negotiated separately, which provides for the funding of collectively bargained fringe benefit obligations on other that a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized;

(11) "Maritime labor agreement" means any collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime stevedoring industry, or any agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing

provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but such term does not include an assessment agreement, as defined in this Act;

(2) No comment.

(3) The bill does not include a reference to "softwood lumber" which is presently defined in section 18 (b)(1) of the Shipping Act, 1916. Softwood lumber is excluded from the tariff filing requirements of that section and we recommend that that exclusion be continued by including a separate definition in the bill for that term. In addition, the bill's definition of bulk cargo includes "neo-bulk." This new definition differs substantially from common usage in the steamship industry in that "neo-bulk" is now commonly understood to cover cargo that is stowed, without load or count, by mechanical means, gravity feed, or blower directly into an ocean going container stowed, in turn, directly upon an ocean going vessel. The cargo is handled as if it were being loaded directly into the vessel hold, i.e., as if it were bulk cargo. We believe that the proposed definition contained in the bill is too broad on the one hand, and is too limited on the other, in that there appears to be no valid reason to restrict it to "lot sizes . . . too large for containers. . . ." We propose the following:

a. Include a separate definition of "softwood lumber" (see the language of section 18(b)(1) of the Shipping Act);

b. Provide a separate definition of "neo-bulk"; and

c. Provide an exclusion from tariff filing requirements of section 9 of the bill for "bulk cargo and softwood lumber." The Commission currently has a rulemaking proceeding to exclude bulk cargo, if loaded in containers, from tariff filing requirements.

(4) No comment.

(5) "Common carrier" as defined in section 3 of S. 1593 could be construed to include common carriers not subject to the Act. This ambiguity could lead to jurisdictional conflicts with other regulatory agencies. Accordingly, we suggest the following change:

"(5) 'Common carrier subject to this Act' means a person, whether or not actually operating a vessel, except ferry boats and ocean tramps, engaged in the transportation by water of passengers or cargo between the United States and a foreign country, whether in the import or export trade;"

(6) Through (12)—No comment.

(14) Subparagraph (14) defines an "ocean freight forwarder" as a person in the United States who dispatches shipments via ocean common carrier and processes the documentation or provides other related services. This definition does not exclude a "shipper or consignee or seller or purchaser of shipments to foreign countries" as the present Shipping Act definition of freight forwarder does. Moreover, the definition does not define what activities are necessary to "dispatch" a shipment. The definition would be less ambiguous if it clearly states what activities are comtemplated. We suggest the following language: "Ocean freight forwarder" means a person in the United States who performs, or holds out to perform a service, or a combination of services for another, which facilitates the shipment of cargo via ocean common carrier. Services performed by ocean freight forwarders include, but are not limited to, the following:

(1) Ordering cargo to port;

(2) Preparing and/or processing export declarations;

(3) Booking, arranging for, or confirming cargo space;

(4) Preparing or processing delivery orders and dock receipts;

(5) Preparing and/or processing ocean bills of lading;

(6) Preparing or processing consular documents or arranging for their certification;

(7) Arranging for warehouse storage;

(8) Arranging for cargo insurance;

(9) Clearing shipments in accordance with United States Government Export regulations;

(10) Preparing and/or sending advance notifications of shipments and other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the shipment of cargo;

(12) Coordinating the movement of shipment from origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses, inspection, or on problems germane to the cargo's movement.

(15) No comment.

(13) The definition of "other persons subject to this Act" includes those who carry on the business of "consolidating." The use of this term is confusing in that it is not

otherwise defined. The term "consolidators" is commonly understood to include all types of entities which consolidate less-than-trailerload (LTL) shipments into container loads. Because the use of the term can refer to those persons whose only function is to consolidate cargo as well as those who also perform the functions of an NVOCC, ocean freight forwarder, trucker, etc., we suggest that the reference in the definition to consolidators be deleted. NVOCC's and ocean freight forwarders are already defined in the bill (see paragraphs (11) and (14)) and subject to the Act's jurisdiction. We do not favor extending jurisdiction to other types of consolidators who are currently either unregulated or regulated by another transportation agency.

(16) The bill includes a definition of "rates." That term is not now defined in the Shipping Act. Paragraph (16) is comprehensive in that rates are defined to include the charges, classifications, rules or regulations that impact on transportation costs. This may be confusing insofar as the current practice in the industry. The regulations, rules and practices of a carrier, while required to appear in its tariff along with the rates the carrier charges for the transportation of commodities, are quite distinct from rates. Using one common term for the purpose of referencing all the listed items may be good shorthand, but it may also result in considerable confusion. We recommend that the definition be deleted.

(17) through (18) No comment.

(19) S. 1593 defines "surcharge" as a temporary rate change tied to a "sudden or extraordinary change" in the costs or revenues of a carrier/conference. The Shipping Act does not define surcharge, although the Commission has dealt with the use of surcharges in its regulations. Section 18(b)(2) has a provision (with the permission of the Commission) for the filing of a rate increase in a tariff on less than 30 days notice. The bill references surcharges under sections (4)(a), (9)(b) and 12(a)(6). We recommend the deletion of these references to surcharges, and recommend that such charges be treated like any other rate filings (see discussion of section 12(a)(6)).

(20) The definition of "tariff" uses the term "rates" which is separately defined in paragraph (16) as including charges, classifications, rules and regulations pertaining to ocean transportation. The Commission's definition of tariff in 46 C.F.R. 536.3 also requires a carrier's "practices" to be included in its tariff. We recommend that the definition or the substantive language of section 9 of S. 1593 make this clear.

(21) through (23) No comment.

(24) (New) We recommend that the definition of "shipment" now contained in section 18(b)(7) of the Shipping Act, 1916 be included in S. 1593. That language is the following: "a shipment shall mean all of that cargo, the carriage of which is evidenced by a single bill of lading." This definition is necessary for purposes of assessing penalties for violations of the Act which set the penalty at so much per shipment. (See sections 14(d) and 15(b)(2) of S. 1593.)

Sec. 4.—Authorized activities

(a) Conference Activities.

Section 4 of the bill specifies those activities and arrangements that may be the subject of agreements. Section 5 requires the filing of agreements covering the arrangements described in section 4 while section 8 grants antitrust immunity for all agreements and activities described in section 4. There is no reference in sections 4, 5 and 8 to agreements involving NVO's. This would mean that no agreements between such persons could be filed and any such agreements would be fully subject to the antitrust laws. In the case of an agreement between a vessel operating carrier and a terminal operator, the vessel carrier would have antitrust immunity while the NVO would not. We believe that the omission of NVO's will have an even greater "chilling effect" on them than is presently the case under section 15. Accordingly, we believe that section 4 should be modified as follows:

"(a) Common Carriers and Other Persons Subject to the Act.—Any common carrier subject to this Act or other person subject to this Act may agree with any other common carrier or other person subject to this Act to—"

(1) The addition of the word "surcharges" in the phrase "(1) discuss, fix, regulate, and agree upon rates, surcharges, accommodations and other conditions of service" implies that surcharges are not rates. In the past, the Commission has considered a surcharge to be a rate. Accordingly, we suggest that the term is unnecessary and may cause confusion.

The position taken by the Commission in *United States* v. *Federal Maritime Commission* No. 79-1299 (D.C. Cir.) is that agreements involving intermodal rates are covered by the current phrase in section 15 which includes agreements "fixing or regulating transportation rates or fares." We believe that the equivalent phrase in section 4 of the bill should be amended as follows to clarify that rates include intermodal through rates: "(1) discuss, fix, regulate, and agree upon rates, including through rates or through intermodal rates, accommodations and other conditions of service;"

(2) through (5) No comment.

(6) Currently section 15 of the Shipping Act, 1916, applies to agreements "controlling, regulating, preventing, or destroying competition." Section 4 of the bill would apply to agreements that "control, regulate or prevent competition among themselves. Since agreements typically affect competition between the members of the agreement and the outsiders as well as competition among the members, the limitation is inappropriate. It may also act to limit the antitrust immunity. We suggest that it be deleted so the phrase reads:

"(6) enter into other agreements to control, regulate, or prevent competition; and"

(7) No comment.

(8) New. Section 15 of the Shipping Act, 1916, includes agreements: "giving or receiving special rates, accommodations or other special privileges or advantages." There is no similar phrase in section 4 of the bill. If the intent of the bill is to confer a broad antitrust exemption on ocean carriers then the activities covered in section 4 of the bill should be at least as broad as those presently covered in section 15 of the Shipping Act, 1916.

(b) Intermodal Activities.

With the addition to section 4(a)(1), there is no reason for section 4(b) "Intermodal Activities." Accordingly, we suggest that it be deleted.

(c) Shippers' Council Activities.

(1) through (2) No comment.

(3) It is unclear whether the rate negotiations described in section 4(c)(3) "Shipper Council Activities" are negotiations which may be taken individually by shippers who are members of a shippers council or whether they are negotiations that may be undertaken by the council itself. We assume the latter. Accordingly, we suggest that the section by amended to read: "Shippers may establish shippers' councils in order to—."

Sec. 5.—Agreements

(a) In General. No comment.

(b) Filing Requirements.

Section 6(d) imposes a 180 day deadline for Commission action but fails to provide any means, short of a formal evidentiary hearing, for the Commission to obtain the information necessary for the Commission to evaluate the agreement under the standards of section 6(b). It would be necessary for the Commission's staff to informally request from proponents the commercial reasons for the agreement. Since proponents would be under no affirmative obligation to justify the agreement, their cooperation could not be assured. Even assuming full cooperation, it would be some time before information could be obtained from proponents located overseas. This would leave little or no time for a formal hearing if the Commission determined that one was necessary or if a party requested a hearing.

We submit that even if the ultimate burden of proof lies with the Commission, proponents should be required to come forward with the commercial reasons for the agreement at the time it is filed. Such a procedure would be consistent with the expedited procedure for general rate increases applicable to domestic carriers which is mandated by Public Law 95-475. As Congress noted in H.R. Rep. No. 474, 95th Cong., 1st Sess. 9 (1977):

"In order for the Commission to meet its deadlines this financial data must essentially be data relied on by the carrier throughout the expedited hearing."

Moreover, it should be noted that section 301(d) of S. 125 contains such a requirement. We suggest that section 5(d) of the bill be modified as set forth below to require proponent to file such a statement concurrently with an agreement. This will allow the Commission to meet the statutorily mandated deadlines.

"(b) Filing Requirements—A true copy of every agreement entered into with respect to any activity described in section 4 shall be filed with the Commission for approval. In the case of oral agreements, complete memoranda specifying in detail the substance of such agreements shall be filed. Every agreement submitted for approval pursuant to section 6 shall be accompanied by a supporting statement setting forth 1) the economic and commercial reasons which caused the formulation of the agreement; 2) the results intended to flow from its implementation; and 3) how the agreement complies with the requirements of paragraph (c) of this section. The statement shall be of such composition, scope, and format that it will serve as the proponents' initial submission if the matter is set down for formal investigation and hearing. The Commission may by regulation prescribe the form and manner in which agreements may be filed; and the Commission shall within 30 days after filing reject any agreement which on its face fails to comply with its regulations or with the provisions of this paragraph.

"Within 10 working days of receipt of an agreement, the Commission shall transmit a notice of its filing to the Federal Register for publication."

(c) Conference Agreements.

The requirements of Section 5(c) of the bill purport to apply only to conference agreements yet subparagraph 4(A) of the section should apply as well to independents. Section 5(c)(4)(B) would be unnecessary in its present form if section 4(a) and (b) were modified to make it clear that surface or air carriers are not parties to agreements authorizing intermodal rates. We suggest the language below be substituted:

"(c) Agreements Between Common Carriers or Other Persons Subject to the Act.—Every Agreement must—

"(1) With respect to any closed conference, provide that any limitation on membership is based on commercially reasonable criteria;

"(2) With respect to any conference agreement, permit any member to withdraw from membership upon reasonable notice without penalty;

"(3) With respect to any conference agreement, engage the services of an independent neutral body of police fully the obligations of the conference and its members;

"(4) Provide the right of independent action in any agreement between carriers not members of the same conferences serving different trades that would otherwise be naturally competitive for each conference.

"(5) With the respect to any conference agreement, provide for a consultation process designed to insure—

"(A) Commercial resolution of disputes;

"(B) Cooperation in preventing malpractice;

"(C) Procedures for promptly and fairly considering shippers' requests and complaints; and

"(D) Regular and orderly communications and exchange of information with shippers and shippers' councils in their trade."

(d) Shippers' Council Agreements.

(1) Subsection (1) implies that shippers' councils must be established by commodity groups. We suggest the following change:

"(d) Shippers' Council Agreement.—Every shippers' council must—

(1) Limit membership to those shippers that have a direct financial interest in the export or import of the cargo covered by the agreement;"

(2) through (4) No comment.

(e) (New) We believe that the language of the Shipping Act, 1916 regarding assessment agreements should be added:

"(e) (1) Assessment Agreements.—Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within one year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of any other section of this Act, or of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein."

(2) The provisions of this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the proceeding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act, the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, for any rates, charges, regulations or prac-

tices of a common carrier by water or other persons subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

Sec. 6.—Action on agreements

(a) Rejection by the Commission.

Section 15 requirements pertaining to self-policing, right of independent action and membership generally involve issues of fact which require a hearing. See for example Agreement—U.S. Atlantic & Gulf/Australia—New Zealand Conference, 9 F.M.C. 1, 6-7 (1965) and Agreement and Practices Pertaining to Limitation on Membership Pacific Coast European Conference, 5 F.M.C. 247 (1957). To attempt to deal with such issues exclusively through the rejection process as contemplated by section 6(a) of the bill would amount to a denial of due process. Proponents are entitled to some sort of hearing when factual issues are involved. Accordingly, we believe that the notice and opportunity for a hearing requirements that apply to the "unjustly discriminatory" and "detrimental to commerce" standards should apply to the standards of section 5(c) and (d) as well.

(b) Standards.

Although the term "public interest" is used by many as a euphemism for the policies of the antitrust laws, the "public interest" is a far broader term. As Justice Harlan pointed out in his concurring opinion in *Federal Maritime Commission* v. *Svenska Amerika Linien,* 390 U.S. 238, 253: "It seems plain that the 'contrary to the public interest' test was intended to comprehend factors unique to the shipping industry as well as those embodied in the antitrust laws."

The elimination of the public interest standard may preclude examination of "factors unique to the shipping industry," a result which may not be intended.

The inclusion of the public interest standard in section 15, did not, for the first time, inject consideration of competition into section 15 cases. The Commission often weighed the benefits of an agreement against the benefits of competition in numerous cases prior to 1961 when the public interest standard was added to the Shipping Act, 1916. See for example: Dollar-Matson Agreements, 1 USMC 750, 755 (1938); Pacific Coast-European Rates and Practices, 2 USMC 58, 61 (1939); Dollar-Matson Agreements, 2 USMC 387, 394 (1940); *Isbrandtsen Co. Inc.* v. *United States,* 211 F. 2d 51, 57 (D.C. Cir. 1954); Pacific Coast European Conference—Payment of Brokerage, 5 FMB 225, 240 (1957); *Swayne & Hoyt* v. *United States,* 300 U.S. 297, 305, 306, (1937).

Eliminating the public interest standard would do nothing to repudiate the cases cited above. If it is the intent of Congress to legislatively overrule that portion of *Svenska* which shifts the burden of proof to the proponents of any agreement that would otherwise violate the antitrust laws, "section 6(c) Burden of Proof" should be modified accordingly. See our comments in regard to that section.

We are deeply concerned by the bill's apparent failure to address the question of the Commission's continuing surveillance over approved agreements.

Whether or not an agreement is unjustly discriminatory or detrimental to the commerce of the United States depends in large measure on how it is implemented by the parties. This cannot be determined in many instances from simply reading the agreement. It is necessary to consider how the agreement is being implemented in light of conditions in the trade. See Agreement No. 9955-1, 18 F.M.C. 433, 465 (1975).

An agreement and the activities taken pursuant to it often cannot be separated.

"If the basic agreement, however, were of a type having no reasonable relationship whatsoever to the activity in question, then evidence of the activity would be totally irrelevant to the question of continued approvability. This could happen, for example, in an agreement among carriers to rationalize sailings when the activity involves rates charged by one of the participating carriers in its tariff. The two activities, rationalization and rate-setting, have no apparent relationship. Contrast this with the present case in which parties establish a vehicle, Star Shipping, whose purpose is to offer a carrier service worldwide, the natural outcome in U.S. trades, at any rate, if such service is common carriage, is to publish tariffs and to establish rates. How can it be argued that the agreement is not responsible for or "proximately" related to this activity and that the Commission cannot touch the agreement if this activity is causing some harm to the commerce of the United States, especially under a statute which requires disapproval of any agreement which the Commission finds 'to operate to the detriment of the commerce of the United States' or 'to be in violation of this Act?'" Agreement No. 9955-1, 18 F.M.C. at 467

These conditions do not remain static. Carriers leave and enter the trade, vessel tonnage devoted to a trade fluctuates, the amount of cargo in a trade varies with world economic conditions and monetary policies change. The Commission has recognized this and has refused to find unjust discrimination or detriment to commerce on the basis of out-dated economic evidence. See Rates, Hong Kong—United States Trade, 11 F.M.C. 168, 173 (1967).

In the case of an initial agreement, the Commission must assume that the agreement will be implemented in a reasonable fashion and rely exclusively on its power of continuing supervision to correct any abuses which may occur in the future. For example, the Commission in Trans-Pacific Freight Conference—Self Policing System, 7 F.M.C. 653, 658 (1963) stated:

"The essence of protestants' argument against approval of these agreements is that the power vested in the neutral body is capable of abuse. The Commission must assume, however, that once the agrement is approved the conference will live up to its obligation to apply that agreement so that it does, in fact, adequately and without discrimination police conference obligations. We are of course under a continuing duty to maintain surveillance of these and all section 15 agreements, and should respondents fail to apply the agreements approved herein effectively and without discrimination, we shall take such steps as are necessary under the circumstances."

Agreement—U.S. Atlantic & Gulf/Australia—N. Zealand Conference, 9 F.M.C. 1, 7-8 (1965) provides another example:

"Although a theoretical possibility exists that the liberal requirements for membership in the Great Lakes section could be abused by Atlantic and Gulf carriers who may desire to vote on Great Lakes rate without serving the Lakes, we believe the greater risk is the possible harm to a carrier which has been unable to carry out its planned sailings, and must thereby be deprived of a voice in determining its rates for the following season, although it intended in good faith to provide service. Should abuses occur, it is in the interests of those carriers providing regular service from the Lakes to bring them to our attention. Our power of continuing supervision over section 15 agreements would permit us at that time to take appropriate action."

Occasionally, in the exercise of its power of continuing surveillance, the Commission disapproves a previously approved agreement because the conditions that originally justified approval of the agreement no longer exist. See Dollar-Matson Agreements, 1 U.S.M.C. 750, 756 (1938); Agreement 8765—Order to Show Cause, 9 F.M.C. 333 (1966) and Rates on U.S. Government Cargoes, 11 F.M.C. 263, 286 (1967). This is, however, the exception because in most cases the agreement can be modified to correct any problem that has arisen. As the Celler Report, Reort of the Antitrust Subcommittee on the Committee on the Judiciary, H.R. REP. NO. 1419, 87 Cong. 2d Sess., 341 (1962) points out:

"This residual power to disapprove operative agreements at any time was a potent deterrent and would have constituted a veritable sword of Damocles suspended over the head of conferences and their chairmen were it not for the very magnitude of its severity. That is to say, it was unlikely that the Board would resort to a weapon which would, if actually brought to bear, destroy a successfully operating conference when one of its important objectives has been the preservation of a healthy conference structure. Not only would frequent invocation of this drastic penalty therefore have proved self-defeating, but more often than not, obliteration of a conference would have been too onerous when viewed in light of the character of the abuse sought to be curbed."

A similar statement appears in Agreement No. 9955-1, 18 F.M.C. 433, 467 (1965):

"If a rate-fixing group such as a conference insists upon publishing discriminatory rates (an activity which Star would call 'proximately caused' by the agreement itself) it is easy to make a case for disapproval. If a conference publishes only one unlawful rate out of thousands, it is obviously much more difficult to justify outright disapproval of the entire agreement. See *Calcutta, East Coast of India and East Pakistan/USA Conference* v. *Federal Maritime Commission*, 399 F. 2d 994 (D.C. Cir., 1968). Similarly, if the Star agreement is not essentially one of concerted multicarrier ratemaking as in the case of a conference, a showing that some of its ratemaking practices in one of its many tariffs, may be unlawful does not warrant wholesale extinction of the basic agreement. Relatively minor modifications to the authority contained in the agreement designed to correct the specific abuses may be all that is required."

The Commission cannot rely exclusively on complaints of shippers and carriers in order to ensure that an agreement is not operating in a fashion which is unjustly discriminatory or detrimental to the commerce of the United States. First, those that are operating unlawfully will do their utmost to conceal their activities from those who might complain. Given the expense of litigation, it is unlikely that a carrier would institute a formal complaint proceeding before the Commission on the basis of rumors in the trade. Obviously, the carrier must have a reasonable probability of succeeding on the merits before undertaking costly litigation. Moreover, the benefits of prevailing on the merits must outweigh the costs of litigation.

Likewise, the Commission cannot rely solely on shippers to file complaints regarding previously approved agreements. As the Celler Report at 371-2 points out:

"Other weaknesses in any system of regulation based primarily upon shippers' objectives are self evident. While the Board for its own reasons never maintained an accurate record of shippers' complaints, it is estimated that an average of 100 to 150 complaints were filed each year. This, of course, may not reveal the true extent of abuses, however, for as Mr. Hallet observed: 'Shippers are hesitant to come forward with complaints for fear that they will find the services they need restricted or otherwise weakened in retaliation.'"

While the Celler Report was referring to informal complaints, the potential for retaliation is as great or greater in the case of formal complaint proceedings. There is no way a complainant can maintain anonymity.

For the commission to rely solely on shippers and carriers to develop an adequate record in proceedings involving agreements relegates the Commission to the passive role which has been so roundly criticized by the courts. For example in *Isbrandtsen* v. *United States,* 96 F. Supp 883-892 (S.D.N.Y. 1951) the following discussion appears:

"In oral argument before us, counsel for the Board seemed to suggest a different interpretation, i.e., that at least in initially approving a conference agreement under Sec. 814, the board has no obligation whatever to inquire into unjust or unfair discrimination; need make no finding on that score; and, only if it does choose to inquire an also does choose to find unjust or unfair discrimination, need it disapprove or modify the agreement on that ground. This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: 'They are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * * The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible."

If the standards for approval contained in the bill are to mean anything, the Commission must retain the ability to make inquiry into activities taken pursuant to a previously approved agreement, institute formal proceedings on its own motion, and, if the facts warrant, disapprove or modify a previously approved agreement. Accordingly, we urge that the Committee favorably consider the amendments proposed in the appendix which will confirm the power of the Commission to maintain continuing surveillance over approved agreements.

The standards in section 6(b) fail to include disapproval for violations of the Shipping Act, 1916. While an unapproved agreement cannot violate the Shipping Act, 1916, once an agreement is implemented, it may become the proximate cause of a violation. See Imposition of Surcharge by the Far East Conference at Searsport Me., 9 F.M.C. 129, 136 (1965). Under such circumstances, cancellation or modification of the agreement would be appropriate. Accordingly, we believe that section 6(b) should be modified to provide that agreements may be cancelled or modified when it is found that they operate in violation of the Act.

We suggest the following modifications to section 6(a):

"(A) Standards.—The Commission shall by order, after notice and hearing, disapprove or modify any agreement, whether or not it has been previously approved by the Commission, that it finds is in violation of this Act or does not comply with the requirements of section 5 or that it finds—

(1) To be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; or

(2) To operate to the detriment of the Commerce of the United States.

The Commission shall approve all other agreements."

(c) Burden of Proof.

The statement regarding burden of proof does not represent any change in the law or existing Commission policy. For example in Agreement No. 9955-1, 18 F.M.C. 426, 429 (1975) the Commission stated:

"It should be noted that in a complaint case wherein a specific violation of the Act is alleged, the complainant has the burden of showing the violation. By alleging a specific violation of the Act in the case involving the approvability of an agreement under section 15, the burden cannot be artificially switched. Even though the parties to an agreement may have the burden of showing benefits to be derived by approval of the agreement, the parties to an agreement cannot be saddled with the burden of proving a negative (i.e., there if no violation of the Act) merely because an allegation to a violation of a specific section of the Act is alleged."

See also Agreement No. 9905, 14 F.M.C. 163, 165 (1970).

We suggest that the bill clarify that Congress intends to legislatively overrule *Svenska* in regard to the shifting of the burden of proof (if that be the intent), but does not intend to preclude the Commission from consideration of competition, apart from the antitrust laws, in considering agreements. We recommend that the following language be added to the section: "The burden of proof shall not be shifted to proponents of any agreement solely on the grounds that the agreement, absent exemption, would violate the antitrust laws."

(d) Duration of Effectiveness—We believe that the language of the bill requires clarification. We suggest the following: "Duration of Effectiveness.—Approved agreements will remain in effect until withdrawn or until disapproved, cancelled or modified by the Commission. The Commission shall not on its own motion limit approval of an agreement to a fixed term."

(e)-(g) No comment.

We believe that the Commission must develop a modified procedure such as the one in use by the ICC in order to meet the 180 day deadline (see 49 C.F.R. 1100.45). Accordingly, we believe the following language should be inserted in the bill: "Hearings.—Hearings pursuant to this section will be limited to the submission of affidavits of fact and memoranda of law unless there is a genuine issue of fact that requires an oral evidentiary hearing. Oral argument may be ordered at the discretion of the Commission."

As discussed above, we believe that the bill should specifically address the question of continuing surveillance. We suggest the following: "Continuing Surveillance.—The Commission may, at any time after an agreeement is approved, institute an investigation and hearing pursuant to section 13(c) to determine if the agreement continues to meet the standards of section 5(b) and (c) and section 6 and, if not, whether or not it should be disapproved or modified. Any previously approved agreement which is the subject of investigation and hearing shall remain in effect during the pendency of the investigation and hearing."

Sec. 7.—Loyalty contracts

(a) Contract Requirements.

At present, the Commission prescribes the form of dual-rate contracts by rule (46 C.F.R. 538). Any contract in substantially the form prescribed is approved. We are not aware that this has caused carriers any particular hardship or delay. In short, the present system seems to be working as intended.

Under S. 1593, the Commission would no longer have any discretion in regard to the approval of dual-rate contracts. Contracts meeting the requirements set forth in section 7 of the bill would be included in the carriers' tariff. There is no requirement that the contracts receive any approval by the Commission prior to their publication in carriers' tariffs.

(1) No Comment.

(2) At present, shippers must be released from the contract with respect to any shipment for which the carrier cannot provide "as much space as the contract shipper will require." This would be changed to "space requested." The reason for the change is unclear.

(3) At present rates cannot be increased on less than 90 days notice. The bill would add several exceptions to the general rule. Increases could be made with the permission of the shipper. It is unclear whether this means a majority of shippers or each individual shipper. The second exception is in cases where the increase will not exceed the level of rates which existed at any time in the prior 180 days. The third exception is in the case of surcharges. The surcharge exception could potentially swallow up the 90-day requirement since fuel costs are a major justification for rate increases.

(4) through (6) No comment.

(7) We are unclear why the words "at some time" appear in the sentence.

(8) through (9) No comment.

(10) The section would exclude all bulk shipments. Section 14(b) of the Shipping Act excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals in less than full shipload lots. The reason for the change is unclear.

Sec. 8.—Exemption from antitrust laws

(a)(1) The exemption fails to include non-vessel operating common carriers. We believe this should be expanded. See our comments to section 4(a) and (b).

(a)(2) Loyalty contracts are only exempted if they conform to requirements of section 7. This seems inconsistent with the treatment of other agreements.

(a)(3) through (a)(5) No comment.

(b) No comment.

Sec. 9.—Tariffs

(a) In General.

1. Section 9 of S. 1593 maintains the requirements for the filing of tariffs by vessel operating common carriers in the foreign commerce. Section 12 of the bill prohibits such a carrier from charging rates or engaging in practices except in accordance with its filed tariff. Thus as vessel common carriers are concerned, the bill continues the Shipping Act's provision that carriers must publish their rates, rules, regulations and practices in a tariff on file with the Commission and must adhere to that tariff strictly. In your introductory remarks, Senator, you explained the reason for continuing the tariff system: "Tariff filing requirements are retained. Liner operators will still be prevented from charging less than the published rates in their tariffs, in order to insure they act as common carriers without discrimination among shippers. This fair competition mandate applies reciprocally both to carriers and to shippers and supports the theory of the conference system that a common tariff can neutralize, to a large extent, the prospect of predatory economic competition between serving a given trade and thus insure stable rates."

The Commission supports the continuation of the tariff filing requirement. Common carriers provide a service that is quasi-public in nature by offering a transportation service available to all shippers on a nondiscriminatory basis. This aids the general commerce by facilitating the efficient flow of our imports and exports. It ensures that shippers here are not disadvantaged in foreign markets due to irregular or discriminatory transportation rates or practices. It also promotes fair competition among carriers in our foreign commerce. A basic prerequisite for such a system mandating nondiscriminatory transportation is the readily available information concerning these schedules of rates and services. A publicly filed tariff is the means by which this information is available to shippers and carriers. The requirement of adherence to these tariffs gives force and meaning to the system.

The reasoning, purpose and policy behind the requirement for the public filing of tariffs has been recognized by Congress and the courts for over ninety years. Section 6 of the Interstate Commerce Act which served as the model for section 18 (a) and (b) of the Shipping Act, mandated the filing of tariffs by common carriers subject to the jurisdiction of the ICC. The purpose of the ICC Act was to secure uniformity of treatment to all shippers, to prevent unjust discrimination and undue prejudice and to prohibit secret arrangements with respect to the charges for interstate transportation. *Kansas City Southern Ry. Co.* v. *C. H. Albers Commn. Co.,* 223 U.S. 573 (1912), *New Yourk, N.H. & H.R. Co.* v. *Interstate Commerce Commission,* 200 U.S. 361 (1906). As a practical matter, the requirement that rates be established in a way that was calculated to give them publicity, to make them inflexible while in effect, and to make them unalterable except in the manner prescribed, was done to advance the purpose of the Act to prevent discrimination among shippers. Through the tariff system, a shipper was able to ascertain the exact cost for the transportation of his property, and also, exactly what will be the cost to his competitor of the transportation of his competitor's cargo. *U.S.* v. *Chicago & A. RY. Co.,* 148 Fed 646, *aff'd. Chicago & A. Ry. Co.* v. *U.S.,* 212 U.S. 563 (1909). The statutory scheme, which also carried over into the 1916 Shipping Act, provided that the tariff, properly filed and in effect, has the force and effect of law and must be adhered to strictly, *Louisville & Nashville R.R.* v. *Maxwell,* 237, U.S. 94, 97 (1915): *Lowden* v. *Simonds—Shields Landsdale Grain Co.,* 306 U.S. 516, 520 (1939); *State of Israel* v. *Metropolitan Dade County Florida,* 431 F. 2d 925, 928 (5th Cir., 1970) *Mueller* v. *Peralta Shipping Corp.,* 8 F.M.C. 361, 365 (1965); *Valley Evaporating Co.* v. *Grace Line, Inc.,* 14 F.M.C. 16, 19-20 (1970).

The historical importance placed upon the tariff filing requirements in the Shipping Act is still valid in current ocean shipping practice. The need for nondiscriminatory transportation service is a critical factor in modern commerce where our export and inport trade is so important to the economic health of the United States. Each U.S. import/export shipper should be afforded the advantage of stable, uniform and competitive charges for transportation of his property free from secret understanding that might beneift a competitor to his economic disadvantage. The tariff system provides the practical means for continuing this policy.

While the tariff system provides rate stability, it also provides flexibility. It should be noted that under the tariff filing requirements of the bill and of the Shipping Act, 1916, carriers retain the ability to react quickly to rate reductions of their competitors. Unlike new or increased rates (which are effective upon 30 day's notice) reduced rates become effective upon filing with the Commission. There is no waiting period before they become effective. We believe that such a system gives the shipping public the benefits of rate-competition, while it discourages discrimination between similarly situated shippers.

As for the specific language of section 9 of S. 1593, the first paragraph sets forth the tariff filing requirements for vessel-operating common carriers. The term "ocean common carrier" is used and since the definition of that term refers only to *vessel*-operating common carriers in foreign commerce, the tariff filing requirement would not be applicable to NVOCC's or terminal operators. This may have been an inadvertent omission. NVOCC's as common carriers are currently required to file their tariffs with the FMC. Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers, 6 F.M.B. 245, 256 (1961). Terminal operators are also required to file a schedule of their charges and practices pursuant to section 17 of the Shipping Act and Commission regulations (46 C.F.R. 533). The rational for requiring vessel common carriers to file their tariffs and strictly adhere to them is equally applicable to NVOCC's who undertake the same responsibility for performance of services and liabilities as a vessel-operating common carrier, and to terminal operators who form a critical link in the transportation system. Terminal operators perform many services for cargo which historically were the responsibility of the carrier. In providing such services for vessels and cargo, there is potential for unjust discrimination that should be taken into consideration. The Commission is now charged with the responsibility of ensuring that terminal operators establish just and reasonable practices. One very effective tool is the public filing of charges, in tarriff form. We thus recommend to the Committee that the present tariff filing requirements for terminal operators and NVOCC's be continued.

We also recommend that, as in section 18(b), that conferences be specifically required to file their tariffs. We note that while the second sentence in section 9(a) as well as section 9(c) refers to a "conference", the initial sentence of section 9(a) does not specifically require conferences to file their tariffs. This should be clarified.

Section 9(a) excludes bulk cargo, as defined in section 3(30), from the tariff filing requirement. In accordance with our remarks with respect to the inclusion of a definition of "softwood lumber" and a separate definition of "neobulk cargo," we recommend that the first clause in section 9(a) be amended to read as follows:

"(1) Except with regard to bulk cargo and softwood lumber, every ocean common carrier, conference of such carriers, and nonvessel-operating common carrier shall file with the Commission, and keep open to public inspection, tariffs showing all its rates, rules, regulations and practices. . . ."

This change would continue the Shipping Act exemption for bulk cargoes and softwood lumber from tariff filing requirements. Neobulk cargo which is moved in containers would still be subject to tariff filing.

We recommend the insertion of the words "or ports" in line 8 on page 18 after the word "points", so that it is clear that carriers and conferences must file their rates for transportation that begins at a U.S. port on an outbound movement or a foreign port on an inbound movement. Not all service offered necessarily involves an inland "point".

Section 9(a)(1) omits the specific requirement found now in 18(b) that a carrier or conference must include in its tariff terminal charges under the carrier's or conference control. While the committee may have assumed that these type of charges would be covered by the language of section 9(a), the fact that they are specifically referenced in the present statute and are omitted in the bill, may give rise to the argument that such charges would no longer be required to be included in a tariff.

We also recommend the deletion of the word "surcharges" from line 2 p. 17. Surcharges should not be singled out from other rates for special mention. The Commission's special permission authority can be used with regard to rates in general, including surcharges.

(b) Initial Rates and Rate Changes—No comment.

(c) Refund of Charges.

Section 9(c) of the bill provides that an ocean common carrier (again, excluding NVOCC's) or conference may refund or waive a portion of the freight charges because of "an error in a tariff of a clerical or administrative nature due to an inadvertence in failing to file a new tariff. . . ." This has the effect of limiting the refund or waiver authority to only certain errors in failing to file new tariffs. There appears to be a mistake in the language of this section. Accordingly, the words "or an error" should be inserted after the word "nature" in line 9, page 17.

This paragraph sets out what is now known as the "special docket relief" procedure. The conditions under which the Commission can currently grant this waiver or refund relief under section 18(b)(3) of the Shipping Act have been changed under section 9(c) through the omission of the first and second prerequisites requiring (1) the filing of a corrected tariff showing the rate on which the refund or waiver is to be based and (2) providing notice to other shippers of the corrected rate. Section 9(b) does continue the requirement that the application for refund or waiver must be filed within 180 days of the date of shipment (see need for definition of this term under the definitions discussion). We recommend inclusion of these two conditions from section 18(b)(3) for the special docket relief authority. Filing of a corrected tariff is necessary since a carrier may not charge any rate except in accordance with a tariff on file and in effect. The requirement that the corrected rate be made available to other shippers through a notice requirement is in line with general tariff principles.

Section 409 of S. 125 would extend the opportunity for seeking such equitable relief to shippers by allowing shippers to make an application on their own behalf for such refund or waiver. We recommend that S. 1593 include such a provision.

Section 9 omits any authority for the Commission to prescribe the form in which tariffs should be filed. It also omits authority for the Commission to reject a tariff if it is not in conformity with Commission regulations. Section 18(b)(4) of the Shipping Act and section 401(b) of S. 125 provide for such authority. The Commission handles hundreds of thousands of tariff pages each year. Without a system prescribing a fairly uniform manner for such filings, the tariff filing system would soon become unmanageable. See the Commission regulations on tariff filing at 46 C.F.R. 536. The authority to prescribe the form of a tariff coupled with the authority to reject a tariff if it does not conform, is necessary for the smooth and efficient administration of the tariff filing system.

Sec 10.—Controlled carriers

(a) through (f)(5) No comment.

(6) Section 10 the bill includes the provisions of the controlled carrier law which appear at section 18(c) of the Shipping Act in their entirety with the addition of a new paragraph which creates a new exception to the controlled carrier requirements, section 10(f)(6). The exception would extend to any controlled carrier registered in a country which is on a specified list *and* which "has vessels registered within its jurisdiction that are privately owned and not operated by a controlled carrier." The Commission is not sure which carriers would fall within this exception. We are not at all certain that a determination as to which of the countries listed had "privately owned vessels" can be made. What criteria should be considered in determining that the vessels are privately owned, and would the controlled carrier have the burden of providing this information? From a purely technical standpoint, we recommend clarification. From a purely policy standpoint, it would appear to be a matter which should be addressed by the Administration (i.e. State or Transportation).

Sec. 11.—Ocean freight forwarders and non-vessel-operating common carriers

Section 11 of S. 1593 radically changes the current regulation of the independent ocean freight forwarder industry. The provisions of section 11 together with the new definition of "ocean freight fowarder" operate to eliminate the prohibition against shippers and importers from acting as freight forwarders for others, eliminates the licensing requirement for forwarders and imposes a bonding requirement of $150,000. The prohibition against a forwarder receiving compensation from a carrier for shipments in which the forwarder has a beneficial interest appears at subparagraph 11(c)(4). This same prohibition was added to section 44 of the Shipping Act, 1916 on August 13, 1981 by the Budget Reconciliation Act, P.L. 97-35.

The requirements of section 44 of the Shipping Act were enacted by Congress in response to widespread abuses in the ocean freight forwarding industry. Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders and Related Matters, and Proposed Revision of General Order 72 (46 C.F.R. 244), FMC Docket No. 765; Investigation of Practices and Agreements of Common Carriers by Water in Connection With Payment of Brokerage or Other Fees to Ocean Freight Forwarder and Freight Brokers, FMC Docket 831, 6 F.M.B. 234 (1961). It is our belief that the statutory scheme has been successful. We are not aware that there has been any indication from the freight forwarder industry or the shipping public that the operation of section 44 has been "a wasteful interference in commercial maritime transactions." Introductory Remarks of Senator Gorton at 127 Cong. Rec. S9231 (daily ed. August 3, 1981). The Commission, therefore, recommends caution with respect to any revision of the freight forwarder provisions of the Shipping Act, 1916.

The licensing requirement serves as a tool to ensure that only experienced and competent personnel are permitted to operate as freight forwarders, a function that involves handling of large sums of money and processing export documentation, and making other arrangements for shipment of cargo. The licensing requirement also gives the Commission a way of eliminating unscrupulous operators from the industry through the revocation of a license when it has been shown that the forwarder has engaged in prohibited practices.

The Commission, therefore, recommends that, absent a showing that the freight forwarding industry is overburdened by regulation, we favor continuation of the present system.

(a) Bonding Requirement.

With respect to the increased bond required by section 11, it may prove to be a more formidable barrier to entry into the freight forwarder business than licensing. It is our staff's estimate that about one third to one half of the currently operating forwarders would not be able to qualify for or wish to purchase a $150,000 bond. Moreover, in the absence of a licening requirement, it is likely that many of those who do not qualify for the bond, would not remove themselves from the ocean freight forwarding business. It is precisely that type of unregulated environment, coupled with the relatively large sums of money for freight charges involved, that would attract incompetent and unscrupulous persons and would detract from a favorable export climate for shippers.

Section 11 also requires the bonding of NVOCC's. What purpose is served and for whose benefit the requirement that an NVOCC acquire a bond is established, is not clear from the bill's language. The confusion is compounded further by the fact that the bill does not authorize or require an NVOCC to do anything, since an NVOCC is not included in the term "ocean common carrier" and is not otherwise specifically cited in the agreements, tariff or prohibited acts sections. We urge the committee clarify the applicability of the bills' provisions to nonvessel-operating common carriers. We recommend that these entities be treated as vessel-operating common carriers since they assume the same liability and responsibility for a shipper's property as the vessel-operating carriers do.

(b) through (c) No comment.

Sec. 12. Prohibited acts.

(a) By Ocean Common Carriers

Section 12(a) applies only to ocean common carriers; non-vessel operating common carriers are not covered. This is a major, and we believe undesirable, change from the current application of the Shipping Act, 1916. The same potential for abuse exists with respect to non-vessel operating common carriers as it does to ocean common carriers. Accordingly, we submit that their omission from the section cannot be justified.

There is nothing in section 12 of the bill which would correspond to section 16, First and section 17 Second paragraph of the Shipping Act, 1916. We do not believe such an omission is intentional and urge that it either be remedied or explained in order to prevent future confusion.

The omission of language corresponding to the "preference and prejudice" language may be based on the misconception that "Preference and Prejudice" is synonymous with the term "unjust discrimination." Both this Commission and the ICC have drawn a distinction between the terms. See for example North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 11 F.M.C. 202, 213 (1967): "To constitute unjust discrimination, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case, it is immaterial that the shippers are not in competition with each other. Where the service is different—e.g., different commodities—or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many releavant considerations render the different rates reasonable. Ordinarily the shippers involved must be competitors."

The omission of the language of section 17 second paragraph removes the primary means by which the Commission can ensure that carriers, forwarders and terminal operators observe reasonable terminal practices. See Proposed Rules Governing Freight Forwarders, 5 F.M.B. 328, 331 (1957).

(1) through (2) No comment.

(3) Section 16 Second currently states: That is shall be unlawful for any common carrier by water, *or any other person subject to this Act,* either alone *or in conjunction with any other person directly, or indirectly;* "To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of *false billing, false*

classification, false weighing, false report of weight, or by any other unjust or unfair device or means." (emphasis added)

Section 12(a)(3) of the bill simply states by *any* means. This would result in a substantial change in the law as may be seen from the discussion in Investigation of Practices of Stockton Elevators, 8 F.M.C. 187, 199 (1964):

"Section 16 prohibits only unjust or unfair devices or means to avoid payment of the applicable rate. Section 17 prohibits only "unjust or unreasonable" practices. Thus, even if Hearing Counsel's contention is that accepting wharfage at less than the applicable rate could be designated as a "device or means" a violation has not occurred unless the record supports an additional finding of unjustness or unfairness."

The omission of "other persons subject to the Act" and "or in conjunction with any other person, directly or indirectly" will make it difficult, if not impossible, to reach schemes that involve carriers operating in collusion with forwarders or other persons subject to the Act.

(3) The language of this section is prospective, and thus no penalty could be assessed for conduct.

(5) Section 17 of the Shipping Act states: "That no common carrier by water in the foreign commerce shall demand, charge, or collect any rate . . .

Section 12(a)(5) omits the terms "demand" or "collect". The terms "demand", "charge", and "collect" are not synonmous and the elements of proof for each differ. See *United States* v. *Bunch,* 165 F 736, 740-741 (E.D. Ark, 1908) in which the court construed similar terms in the Interstate Commerce Act.

(6) While we support the concept of requiring the termination of a surcharge after the need for it has ended, the Commission does not currently receive financial data in support of surcharges filed in the foreign trades. This being the case, the Commission would have no means to police the provision. We urge that it either be deleted or replaced by a provision which gives the Commission the authority to require detailed accounting data from the persons involved.

(7) See our comments regarding the omission of the terms "directly or indirectly" in Section 12(a)(3).

(8) No comment.

(9) The prohibition against any practice designed to reduce or eliminate nonconference competition seems inconsistent with the concept of closed conferences.

(10) Section 14 (First) of the Shipping Act, 1916, provides that no carrier shall directly or indirectly: Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper.

The section is designed to reach a deferred rebate scheme when it is in the incipient stage. The language of the bill covering only the actual offer or payment will be far more restrictive. In addition, the language of the bill probably will not reach indirect deferred rebate schemes.

(11) The language of the section is prospective, and thus no penalty could be assessed for conduct prior to a finding of discrimination.

(b) By Shippers, Ocean Freight Forwarders or Non-Vessel Operating Common Carriers.

Currently, section 16 Initial Paragraph (the equivalent section) applies to any "shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent or employee thereof." Section 12(b) is much narrower. This will restrict the Commission's ability to deal with rebating. The prohibited devices for obtaining a reduced rate which currently appear in section 16 Initial Paragraph do not appear in section 12(b) of the bill. See, our comments in regard section 12(a)(5). Even a legitimate rate request would fall under the prohibitions of section 12(b) (see S. 125, sections 408, 504).

(c) By Other Persons.

(1) Reference is made to "suspended" agreements. The bill contains no authority to suspend agreements.

(2) Section 20 of the Shipping Act, 1916, (the equivalent section) applies to any "common carrer by water or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information." Section 12(c)(2) fails to cover a number of the individuals that are currently covered. It would not cover neutral body employees or outside experts or consultants. Employees would not be individually liable for disclosure. In short, section 12(c)(2) is far weaker than section 20 of the Shipping Act.

Although Section 12 of the bill appears, at first reading, to simply clarify those sections of the Shipping Act, 1916 pertaining to prohibited acts, it actually makes various substantive changes which may not be intended.

With few exceptions, section 14, 16, 17, 18(b)(3), 18(b)(5) and 20 have served the shipping public well. Since they are generally patterned after provisions in the Interstate Commerce Act, the Commission may rely on a considerable body of ICC case law as well as its own in construing the sections. We are aware of no serious problems with the sections as written. Accordingly, it is the position of the Commission that SEC. 12 is unnecessary and will actually cause confusion where none presently exists. We would prefer that the bill either retain the existing statutory language or adopt the prohibited acts section of S. 125 (including section 407 & 408).

Sec. 13.—Complaints, investigations and reparations

At present, any person may file a complaint with the Commission. Section 13 would permit complaints from only ocean common carriers, shippers or other persons subject to the Act. A non-vessel operating common carrier would have no rights as a complainant. We believe that section 13 should cover any person as does section 22(a) of the Shipping Act, 1916.

Sec. 14.—Subpenas and discovery

(a) through (b) No comment.

(c) "Suspension of tariffs" provision does not cover non-vessel operating common carriers. Inasmuch as the suspension of a carrier's tariff puts it out of business in the trade, the penalty is extremely harsh. It is doubtful whether the Commission would use it except in the most extreme circumstances. It is highly unlikely that it would ever be used in connection with a fact-finding investigation.

(d) through (e) No comment.

Sec. 15.—Penalties

(a) Assessment of Penalty.

The penalty provisions of the bill do not cover non-vessel operating common carriers.

(b) Tariff Suspension for Rebating

The section contains a severe penalty for carriers that rebate but has no corresponding penalty for shippers or others receiving the rebate.

(c) Review of Civil Penalty—No comment.

(d) Action Upon Failure to Pay Assessment

We believe that the district court cannot be prevented from reviewing the assessment order.

(e) through (f) No comment.

Sec. 16.—Commission orders

(a) through (e) No comment.

(f) The Commission believes that it should have authority to represent itself in court. Accordingly, we fully support the provisions proposed in section 16(f) of the bill. This parallels the authority granted to several other regulatory agencies.

Sec. 17.—Exemptions

No comment.

Sec. 18.—Regulations

No comment.

Sec. 19.—Repeals and conforming amendments

(a) Repeals

Section 43 of the Shipping Act, 1916, gives the Commission rulemaking authority in both the domestic and foreign commerce. It should not be repealed as to domestic commerce.

Information gathering powers—section 21 of the Shipping Act, 1916

S. 1593 omits the section 21 authority of the Commission to require the filing of special or periodic reports by carriers or other persons subject to our jurisdiction pertaining to their business activities. The bill, as drafted, proposes to eliminate this authority in the Commission with respect to the regulation of the foreign ocean borne commerce, but to maintain the authority with respect to the regulation of our domestic offshore commerce (see section 19(b)).

The Commission strongly recommends to the Committee that section 21 authority be maintained. The ability of the Commission to obtain information regarding the industry it regulates is vital to our ability to function effectively. To require the Commission to initiate a formal proceeding each time we need information is wasteful and an unnecessary burden on the parties who would be required to appear before us. It is even questionable whether the Commission could start a proceeding for the purpose of merely seeking information.

An administrative agency is expected to be an expert in a particular field. The FMC is the expert governmental agency with respect to maritime regulatory matters. The Commission has three types of functions: quasi-judicial, quasi-legislative and enforcement. While our subpoena and discovery powers may be sufficient to support the Commission's quasi-judicial responsibilities, they are not sufficient to meet the informational needs of our agency with respect to our other functions. Since, as an administrative agency, we represent the interest of the public as a whole, we have a responsibility to act with as full a knowledge of the relevant facts as possible, not just on the facts voluntarily supplied by interested parties. In order to function properly, the Commission should continue to have the ability to request by order specific information that we consider necessary to informed decisionmaking.

The Commission has not abused this authority. We use our section 21 authority on infrequent but necessary occasions. We do not believe it has been a burden on the people we regulate. Oftentimes, the Commission will decide to forego an investigation or formal proceeding after it receives information which convinces it that further action by the Commission in unwarranted. This obviates the need for formal action and saves the parties time and money that a more formal proceeding may entail.

In order to demonstrate in more concrete terms how the Commission has used its section 21 authority, we include the following comprehensive list of section 21 orders issued by the Commission in the past 5 years:

1976—SEVEN ORDERS

January 30, 1976: Proposed Suspension of consolidation allowances between U.S. Atlantic ports and ports in Europe.

April 15, 1976: Report of Vessel Utilization Data by U.S. Flag Carriers Transporting DOD Cargoes.

June 14, 1976: Report of Information Concerning Interisland Intermodal Lines' acquisition of Berwind Lines' assets relatives to determination of the reasonableness of Interislands rates in the Puerto Rico/Virgin Islands trades.

July 15, 1976: Clarification of June 14, 1976 Order.

September 20, 1976: Cargo movement between Busan and Incheon and U.S. relative to the Incheon rate differential.

October 26, 1976: Report of utilization experience of carriers' transporting DOD cargo.

November 18, 1976: Information regarding use of Uniform Capacity Utilization Factor (UCUF) on MSC trade routes.

1977—THREE ORDERS

October 3, 1977: Status of Seatrain Agencies, Inc., in order to determine whether it is a common carrier.

November 18, 1977: Report rates and service of Trailer Marine Transport for through transportation between U.S. and Puerto Rico (combined with Order to Show Cause).

December 8, 1977: Status of Pan American Mail Line, Inc., d/b/a Flomerca Trailer Service to determine whether Equalization charge should be levied on cargo it carries.

1978—FIVE ORDERS

April 4, 1978: Report concerning outport rate level of PWC members between U.S. and Naha, Okinawa.

April 14, 1978: Information concerning the equalization and absorption practices of PWC members for cargo moving from Portland, Oregon area.

April 17, 1978: Report on Baltic Shipping Company concerning rates charged not in accordance with tariff on shipment of buses from Bremerhaven, Germany to Houston.

April 17, 1978: Requested information concerning Baltic Shipping Company's cargo shipments, space charter arrangements, and container leasing and pooling arrangements in order to determine whether it has violated sections 15, 16, 17, and or 18 of the Shipping Act, 1916.

October 27, 1978: Requested information regarding the ownership and control of common carriers in foreign commerce in order to identify "controlled carriers."

1979—TWO ORDERS

January 18, 1979: Request information from 16 freight forwarders concerning payments in excess of compensation provided in carriers' tariffs.

June 8, 1979: Identification of controlled carriers.

1980—THREE ORDERS

May 29, 1980: Identification of controlled carriers.

September 3, 1980: Request for information concerning the pricing policy of North Atlantic carriers for U.S. exporters.

December 22, 1980: Requested information from Contract Marine Carriers, Inc., concerning its rates and service to determine whether it has violated sections 16, Second and 18(b)(3) of the Shipping Act, 1916.

We also note that the requirement of the certification by carriers that they have promulgated an anti-rebating policy within their companies, now appearing under section 21(b) of the Shipping Act, 1916 has also been omitted in S. 1593. This requirement was added to the Shipping Act by P.L. 96-25 (June 19, 1979, 93 STAT. 71) the so-called "anti-rebating" law. It was part of a strong congressional statement against illegal rebating in our ocean commerce. Congress strengthened the FMC enforcement power with respect to illegal rebating and substantially increased the civil penalty applicable to a violation ($5,000 to $25,000 per shipment). If the certification requirement is deleted from the law by S. 1593, the action may send a signal to carriers that Congress has reconsidered its recent pronouncement and is not as strong in its condemnation of illegal rebating. We feel that this would be unwise and therefore recommend that section 21(b) be maintained.

INTERGOVERNMENTAL MARITIME AGREEMENTS

The Commission believes that, in view of their foreign policy aspects and promotional overtones, the negotiation and content of intergovernmental maritime agreements are clearly the responsibility of the Executive Branch. We thus respectfully defer to the views of the spokesmen from the Administration with regard to these agreements.

However, the Commission has had considerable experience in dealing with agreements among ocean carriers in trades, such as those with Brazil and Argentina, where intergovernmental agreements are in effect. It is typical for the parties to such carrier-to-carrier agreements to seek approval on the basis of allegations that they are seeking to implement the underlying government-to-government agreement. Unlike intergovernmental agreements dealing with other industries such as aviation, however, intergovernmental maritime agreements have historically been of a very general nature and offer little guidance to the maritime industry or this Commission on how the governments intended that such agreements should be implemented. This is not intended to be a criticism of those agreements. It may very well serve our broad national interests for such agreements to be of a general nature and it is certainly not within the expertise of this agency to judge those matters. The point that is important from our perspective, however, is that it is sometimes difficult to determine whether or not a carrier-to-carrier agreement does, in fact, implement an intergovernmental maritime agreement in the manner that the government negotiators intended. As long as such problems exist, the Commission would have difficulty administering a provision such as that in S. 125 which creates a presumption in favor of this type of carrier agreement.

This completes our comments with respect to S. 1593. The Commission and its staff stand ready to assist the Committee in any way with respect to its consideration of this important legislation.

Sincerely,

ALAN GREEN, Jr., *Chairman.*

[The following information was subsequently received for the record:]

FEDERAL MARITIME COMMISSION,
Washington, D.C., December 1, 1981.

HON. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine,
U.S. Senate, Washington, D.C.

Dear Mr. CHAIRMAN: Enclosed please find the Federal Maritime Commission's responses to certain questions regarding S. 1593 and S. 125 referred to us by your staff subsequent to Chairman Green's appearance before your Subcommittee.

Question. Is it sufficiently clear in the bill that the new Shipping Act will be the exclusive governing statute over liner shipping in the foreign commerce?

Answer. While the intent of the Subcommittee is commendably clear on this issue, there are three modifications to S. 1593 which we believe are necessary to carry out that intent.

First, under the terms of section 4 of S. 1593, antitrust immunity would extend only to agreements between or among vessel operating carriers or other persons subject to the Act and to shippers' council agreements. This coverage excludes agreements between or among non-vessel operating common carriers and it could also be argued that the language excludes an agreement between a vessel operating carrier and a non-vessel operating carrier.[1]

Unless antitrust immunity is extended to all types of agreements in the maritime industry, we cannot agree that the "new Shipping Act" will be the exclusive governing statute over liner shipping in the foreign commerce.

Similarly, the intended exclusivity of S. 1593 is marred by the language of section 4(a)(6) which limits authorized activities to agreements among carriers to control, regulate or prevent competition "among themselves." This limiting language is reinforced by the provisions of section 12(a)(9) of the bill which would prohibit common carriers from engaging in any practice designed to "reduce or eliminate the participation of nonconference carriers."

Many of the agreements which now exist in the maritime industry and which would be authorized by other provisions of section 4 of S. 1593 have the effect of controlling or reducing outside competition. Therefore, this limiting language may make all such agreements vulnerable to attack under the antitrust laws, a result that is clearly contrary to the intent of the bill.

The third change necessary to carry out this intent is in section 8(a)(2) of the bill which, as currently written, would make loyalty contracts vulnerable to an antitrust challenge on the basis that they did not conform to the requirements of section 7 of the bill. The words, "that conforms with the requirements of section 7," should be deleted in order to avoid this result.

With appropriate modifications to sections 4, 8 and 12 of S. 1593, we believe it would clearly be the exclusive governing statute for liner shipping regulation in the U.S. foreign commerce.

Question. Is it clear that DOJ will have no role?

Answer. We do not believe that S. 1593 would entirely eliminate the role of the Department of Justice in Shipping Act matters, even with the changes that we suggest to sections 4, 8 and 12 of the bill. Obviously, the Attorney General, in his role as attorney for the United states, would have standing to participate in any Commission or court proceeding in which issues affecting broad national interests may be decided.

In the more specific context of antitrust issues, S. 1593 would not specifically prohibit the Department of Justice from filing protests to agreements, although the Department's traditional reliance upon burden of proof arguments arising out of the *Svenska* decision[2] would no longer be possible. However, we believe the bill would still permit arguments to be made as to whether the anticompetitive effects of a particular agreement would be detrimental to commerce.

The one role currently exercised by DOJ in the liner shipping area which would clearly be removed by S. 1593 (assuming appropriate modifications are made to sections 4, 8 and 12), is the pursuit and prosecution of antitrust violations in the courts with respect to activities that are within the jurisdiction of this agency. Clearly defined statutory antitrust immunity would mean that the stated objective of regulation by a single Federal agency could be realized.

Question. What has been the motivation and effect of "blocking statues" enacted by foreign governments to prohibit their corporations from releasing business records for purposes of U.S. enforcement?

Answer. The "motivation" underlying the action of foreign governments in enacting "blocking statutes" is open to speculation, although it would appear that some blocking statutes have been enacted in response to what foreign governments perceive as inappropriate extraterritorial application of U.S. antitrust and shipping laws. It is difficult to attribute a single motivation to blocking statutes due to their lack of uniformity. In some cases, a total ban is imposed against releasing business records, while in other cases, there is a requirement to obtain government permission before records may be released. With regard to the effect of the blocking statutes on Commission enforcement of U.S. maritime law, the Commission had found prior to the enactment of the anti-rebating law (P.L. 96-25) that "blocking statutes" had hampered our enforcement efforts in investigating Shipping Act violations to the point where we were unable, in some cases, to obtain certain essential shipping documents located in foreign countries. Since enactment of the new law in 1979, we have not had an occasion in which such blocking statutes have been raised as an obstacle.

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[1] Upon re-reading section 4 of the bill, it appears that the Commission's testimony of September 21, 1981 was erroneous in suggesting that agreements between or among marine terminal operators and ocean freight forwarders would be excluded from its coverage. Since those entities are "other persons subject to this Act", their agreements would be covered by section 4.

[2] *Federal Maritime Commission* v. *Svenska Amerika Linien,* 390 U.S. 238 (1968).

Question. Has any foreign carrier prohibited by its nation's blocking statute from producing documents ever suffered tariff suspension as a result?

Answer. No. The Commission has the authority to suspend a carrier's tariff pursuant to section 18(b)(7), as a penalty for illegal rebating; under section 18(c), in connection with an investigation of the rates of a controlled carrier; or under section 22(c)(2), for failure of a carrier to comply with a subpoena or discovery request during an adjudication involving illegal rebating activity. The Commission has not yet exercised its authority under section 22(c)(2) to suspend a carrier's tariff for failure to comply with a discovery request or subpoena related to an investigation into illegal rebating activity, due in large part to the Commission's ability to date to reach fair and equitable settlements in rebating cases involving the production of overseas documents.

Question. You indicated your support of requiring an intermodal carrier operating through a Canadian or Mexican port to file a uniform tariff with the Commission. It would seem odd to use legislation designed to end extraterritorial enforcement of antitrust laws as a vehicle for an extraterritorial tariff filing requirements.

In light of understandable objection from these nations and our State Department, what reasons should compel this solution to the cargo diversion problem?

Answer. The Commission does not believe that the primary objective of S. 1593 and S. 125 is to resolve general questions involving extraterritorial application of U.S. law, but rather to emphasize that maritime, not antitrust, considerations will be exclusively applied to all U.S. regulation of liner shipping in the U.S. foreign commerce. The bills stress that, in those instances where "extraterritorial" application of U.S. law is necessary to preserve honest competition and efficient transportation in the U.S. foreign commerce, it will be maritime, not antitrust, laws which are so applied.

Within this context, the Commission's position on intermodal filings is fully consistent with the objectives of both S. 1593 and S. 125. The Commission believes that all through transportation of U.S. origin/destination cargo by an ocean common carrier to or from inland points in the United States should be subject to uniform regulation. An ocean common carrier offering a through intermodal service for cargo which originates in or is destined for the United States, is a carrier operating in the U.S. foreign commerce and should be subject to the same tariff filing requirements and the same requirement to serve shippers on a nondiscriminatory basis as other common carriers operating in our foreign commerce.

Question. Does the Justice Department cooperate with the FMC when it is called on to represent the FMC in court?

Answer. Under the Hobbs Act, 28 U.S.C. § 2341 et seq., the FMC has the authority to represent itself before the Circuit Courts of Appeals in proceedings which challenge Commission final orders (28 U.S.C. § 2342). In such Hobbs Act appeals, the Antitrust Division of the Department of Justice represents the United States as statutory respondent (28 U.S.C. § 2348). Many of the FMC cases taken to court under the Hobbs Act involve the grant of antitrust immunity by the Commission. The Antitrust Division naturally looks with disfavor on such actions. In cases arising in the District Courts, the Civil Division of the Department of Justice represents the FMC as a client agency. Such cases usually involve the Commission as plaintiff in suits involving civil penalty claims, requests for injunctive relief, and subpoena enforcement. Prior to the reorganization of DOJ during the Carter Administration, these cases were handled by what was then DOJ's Admiralty and Shipping section. These cases are now usually referred to the local U.S. Attorney's Office. In appeals from District Court cases, the Commission is represented by the Civil Division at DOJ.

This framework for the representation of the FMC in court has at times resulted in conflicts between FMC and DOJ. Although the Commission is specifically authorized by Shipping Act sections 27 and 29 to seek District Court enforcement of its orders, even this statutory authority to represent itself has been questioned by Justice. Whenever the Commission appears in District Court, either as a defendant or as a plaintiff seeking injunctive relief (e.g. to protect its jurisdiction or to enjoin illegal tariff implementation by carriers), it must, under 28 U.S.C. §§ 516 or 519, be represented by a Justice Department attorney. Similarly, when an appeal is taken from a District Court action, even if it involves the Commission's enforcement of one of its own orders, the Justice Department has taken the position that it is the only agency which can represent the Commission in the Court of Appeals.

Moreover, even though Commission attorneys regularly defend Commission orders in review proceedings in the Court of Appeals under authority given by 28 U.S.C. § 2341 (The Hobbs Act), DOJ has been steadfast in its insistence on representing the Commission or controlling the appeal of District Court decisions affecting the Commission. This is the case despite a frequent divergence in our agencies' respective philosophical views on the issues in question. DOJ has also directly interceded to block Commission appearances in District Court litigation affecting the Commission's jurisdiction. It has admonished the Commission for filing amicus intervention papers in other district or appellate court litigation in which the Commission was not named as a party, but which could impact on the Commission or its authority.

It is not surprising that litigation conflicts develop between the Commission and the Department of Justice, particularly the Antitrust Division. As you know, the Department of Justice and the Commission have frequently disagreed on the application of the Shipping Act to certain section 15 agreements and other policy or procedural positions taken by the Commission. The Department of Justice has also, on its own challenged Commission orders in court. A recent example is *U.S.A.* v. *F.M.C., et al.,* D.C.A. No. 79-1299, in which the Department has persuaded the court to grant en banc reconsideration of the decision of a panel of three judges upholding the Commission's statutory authority to approve, and thereby immunize from antitrust challenge, conference intermodal authority.

None of these problems should overshadow the fact that there have been instances in which the FMC has enjoyed fruitful and constructive working relationships with attorneys at the Department of Justice.

The Commission strongly believes that problems which exist will be resolved, first, through the clarification by Congress of the Commission's legislative mandate, and, second, through S. 1593's authorization for the FMC to represent itself in court. This authority is consistent with that of many other regulatory agencies, such as the Securities and Exchange Commission and the National Labor Relations Board.

Question. If we are concerned that smaller shippers will be in a disadvantageous bargaining position, would not authorization of shippers' councils and export trading companies protect them by permitting aggregation of their market influence?

Answer. In theory, the interests of small shippers may be better represented in the aggregate by shippers' councils[3] on certain matters which the bill authorizes shippers to discuss with conferences. These matters include shipper council consultation and negotiation with carriers or conferences with respect to general rate levels, rules, practices or services. However, shippers' councils would not be authorized by the language of sections 4 and 5 of S. 1593 to negotiate individual commodity rates. Without power to collectively negotiate individual commodity rates, small shippers may have no greater market influence with a carrier or conference.

This completes the Commission's response to the questions submitted. Should you have any questions concerning the above or if you have any further questions you would like the Commission to address, please do not hesitate to contact me.

Sincerely,

ALAN GREEN, Jr., *Chairman.*

FEDERAL MARITIME COMMISSION,
Washington, D.C., December 1, 1981.

Hon. DANIEL K. INOUYE,
Subcommittee on Merchant Marine,
U.S. Senate, Washington, D.C.

DEAR SENATOR INOUYE: Enclosed please find the responses of the Federal Maritime Commission to the written questions referred to the Commission after Chairman Green's appearance before the Merchant Marine Subcommittee. Our response to questions posed orally to the Chairman during the hearing is now being prepared and will be transmitted by a subsequent letter.

Question. It appears that under S. 1593, maritime collective bargaining agreements would be fully subject to the FMC's jurisdiction, including approval by the agency.

Last year, after difficult and complex negotiations, Congress removed collective bargaining agreements from pre-implementation approval by the FMC, but continued FMC review of certain maritime labor agreements to insure equal treatment of shippers, cargo, etc. The FMC supported that legislation.

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[3] Assuming the enactment of some form of Export Trading Company legislation currently pending before Congress (e.g. S. 734), these companies could have a significant impact on the need for and/or the structure of shippers' councils.

S. 1593 in effect repeals the law we enacted last year. Do you think it should?

Answer. It is our understanding that the drafters of S. 1593 did not intend to repeal the provisions of P.L. 96-325, the Maritime Labor Agreements Act, and that the omission of that law's provisions from S. 1593 was an oversight.

Question. If you believe the Maritime Labor Agreements Act should be included in S. 1593, can it be done without changing any of the provisions of the Labor Agreements Act? I realize this is a technical question, but since the statutory scheme of S. 1593 is different from the present Shipping Act, I wonder if there is a problem.

Answer. We see no reason why P.L. 96-325 cannot be incorporated into S. 1593 as it is currently written. The Commission's letter to the Subcommittee, dated September 21, 1981, contained our more technical comments on the legislation and suggests amendments to sections 3 and 5 of the bill (pages 1-2, 9-10 of the letter) to accomplish the change.

Question. S. 1593 would deprive the FMC of power to require filing of special reports. The current Shipping Act (§ 21) and S. 125 give the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic steamship investigation concerning the carriage of buses financed by the U.S. government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal congress was weakening in its resolve against illegal rebating?

Answer. We strongly recommend that the legislation continue the Commission's section 21(a) authority. We discussed the need for section 21 at some length in our letter (pp. 30-33). The Commission also recommends that section 21(b) be retained in the legislation for the reason you cite. (See our letter pp. 33-34).

Question. Unlike S. 125, S. 1593 allows rate decreases to become effective upon publication and filing with the FMC.

Won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. S. 1593 continues the current notice requirements of the Shipping Act for tariff rate filing, including the allowance that any rate reductions may be effective upon publication and filing. S. 125 alters this scheme by requiring a fifteen-day notice period prior to the effectiveness of a decrease in tariff rates. Such a notice period does discourage rate decreases that favor a particular shipper, but which are not filed until the last possible moment prior to sailing, effectively precluding other shippers from taking advantage of the rate decrease.

Question. Doesn't advance notice enhance the effectiveness of conferences by giving them an opportunity to respond to rate cutting by independents?

Answer. We believe that any tariff system should provide for a significant degree of downward rate flexibility. Congress should weigh the need for rate flexibility against the desirability of enhancing the competitive power of conferences vis-a-vis the independent carriers in the trade by enabling the conference to know what rates the independents charge and to adjust their own rates to meet the competition before the cargo has moved.

Question. S. 1593 removes the licensing requirement for independent ocean freight forwarders. S. 125 retains this requirement. Do you believe the FMC needs this authority?

Answer. The Commission believes that the regulatory requirements under section 44 of the Shipping Act, 1916, have been effective in correcting the widespread abuses that pervaded the ocean freight forwarder industry prior to 1961. It is not a question of whether or not the FMC needs this authority, rather it is a question of whether or not the ocean freight forwarding industry benefits from the licensing, bonding and other requirements under section 44. We believe it does. Licensing provides an initial screening of those who wish to enter the forwarding industry. It ensures taht a prospective licensee has the minimal qualifications and experience necessary to provide shippers and carriers with the services they require. Revocation of a forwarder's license is also a swift and effective means of enforcement, preventing an unscrupulous forwarder from continuing in the business. For these reasons we recommend that the licensing of ocean freight forwarders be continued.

Question. S. 1593 authorizes closed conferences in an attempt to eliminate overtonnaging and inefficiency in the U.S. trades. It prohibits the use of a major tool which enables closed conferences to operate effectively, i.e., the deferred rebate.

In the absence of the deferred rebate as a loyalty or tying device, how effectively do you believe closed conferences can achieve their objectives under S. 1593?

Answer. A closed operating in an open trade without a strong tying device such as the use of deferred rebates, would not be effective in reducing overtonnaging and inefficiencies in the U.S. trades. The European model of a closed conference operates with strong tying devices and in trades that are closed. In the United States trades, some conferences may not wish to limit membership but may actually seek to recruit members. In addition, conferences in many U.S. trades do not control a sufficient portion of the cargo in the trade to be a dominant rate leader because of strong competition from independent carriers. As the member lines from CASO stated during their recent appearance before the House Merchant Marine Committee. (Nov. 5, 1981), authorization of closed conferences under these circumstances may be "meaningless" and a "hollow victory."

Question. S. 1593 repeals the *Svenska* test so that the FMC could not apply antitrust standards in disapproving agreements.

Moreover, under S. 1593, the Department of Justice could not be a party in any proceeeding before the FMC to disapprove an agreement.

Yet, because of the limited scope of the antitrust exemption under S. 1593, many agreements might be subject to the antitrust laws.

Isn't it reasonable to assume that this statutory scheme will encourage the Department of Justice to invoke the antitrust laws in the courts, in cases where it now intervenes before the FMC and raises the *Svenska* test under the Shipping Act?

Answer. While the intent of the Subcommittee to create a clear statutory exemption of maritime agreements from the antitrust laws is commendably clear, there are three modifications to S. 1593 which we believe are necessary to carry out that intent.

First, under terms of section 4 of S. 1593, antitrust immunity would extend only to agreements between or among vessel operating carriers or other persons subject to the Act and to shippers' council agreements. This coverage excludes agreements between or among non-vessel operating common carriers and it could also be argued that the language excludes an agreement between a vessel operating carrier and a non-vessel operating carrier.[1]

Similarly, the intended exclusivity of S. 1593 is marred by the language of section 4(a)(6) which limits authorized activities to agreements among carriers to control, regulate or prevent competition "among themselves." This limiting language is reinforced by the provisions of section 12(a)(9) of the bill which would prohibit common carriers from engaging in any practice designed to "reduced or eliminate the participation of nonconference carriers."

Many of the agreements which now exist in the maritime industry and which would be authorized by other provisions of section 4 of S. 1593, have the effect of controlling or reducing outside competition. Therefore, this limiting language may make all such agreements vulnerable to attack under the antitrust laws, a result that is clearly contrary to the intent of the bill.

The third change necessary to carry out this intent is in section 8(a)(2) of the bill which, as currently written, would make loyalty contracts vulnerable to an antitrust challenge on the basis that they did not conform to the requirements of section 7 of the bill. The words, "that conforms with the requirements of section 7" should be deleted in order to avoid this result.

Unless appropriate changes are made to sections 4, 8 and 12, we would agree that it is reasonable to assume that the Department of Justice will attempt to invoke the antitrust laws in the courts against many agreements in the maritime field.[2]

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[1] Upon re-reading section 4 of the bill, it appears that the Commission's testimony of September 21, 1981, was erroneous in suggesting that agreements between or among marine terminal operators and ocean freight forwarders would be excluded from its coverage. Since those entities are "other persons subject to this Act," their agreements would be covered by section 4.

[2] In the context of antitrust issues, we should note our disagreement with a premise set forth in your question. In our view, S. 1593 would not specifically prohibit the Department of Justice from filing protests to agreements nor would it prohibit that agency from participating (other than as a complainant) as a party to FMC proceedings. However, the Department's traditional reliance upon burden of proof arguments arising out of the *Svenska* decision would no longer be possible. We believe the bill would still permit arguments to be made as to whether the anticompetitive effects of a particular agreement would be detrimental to commerce or unjustly discriminatory.

The one role currently exercised by DOJ in the liner shipping area and which would be clearly removed by S. 1593 (assuming appropriate modifications to sections 4, 8 and 12) is the pursuit and prosecution of antitrust violations in the Courts with respect to activities within the

Question. S. 1593 gives the FMC 6 months within which to act on an agreement, with a possibility of a 3-month extension.

Are these time limits sufficient to enable the FMC to render a reasoned decision which will be less susceptible to attack in the courts?

Answer. The Commission is committed to conducting its proceedings for approval/disapproval of agreements as expeditiously as possible. As we indicated in our letter (pp. 7–8, 17), in order for the Commission to complete its action within the time limits set out in S. 1593, we require three things: one, that Congress clarify the antitrust immunity applicable to the liner shipping industry; two, that the parties seeking approval of an agreement file a detailed statement with the proposed agreement explaining its terms, purposes and effects (see pp. 7–8 of our letter) and three, that a modified hearing procedure along the same lines as that now used by the ICC be adopted for FMC proceedings (see p. 17 of our letter). If these changes are adopted, we believe that the Commission can review and evaluate agreements within the time limits allowed and render reasoned decisions. Even so, given this shortened procedure, there will not, in some cases, be the opportunity for extended in-depth hearings into the prospective effect of a proposed agreement, particularly those which present novel issues. This highlights the importance of the Commission's authority of continuing surveillance—to continue to review an already approved agreement to ensure that its implementation still meets the standards and requirements of the Act.

Question. S. 125 provides for expedited, temporary approval of agreements within 45 days of filing, if its implementation would prevent harm to the proponents and not injure outsiders. S. 1593 has no such provision.

Should the legislation we recommend contain one?

Answer. The authority to give temporary approval to an agreement pending the outcome of hearings has been found to exist in section 15 of the Shipping Act by Commission and Court decisions.[3] This authority has been extremely useful in the past. For example, in October 1974, the Commission used the authority to permit the immediate chartering of vessels between Sea-Land Service, Inc. and the Puerto Rico Maritime Shipping Authority, without which approval virtually all liner service between North Atlantic ports and Puerto Rico would have ceased.

While the time limits prescribed by S. 1593 would probably reduce the need for this authority in some instances, we still believe it desirable to retain such authority to accommodate legitimate emergencies such as the Puerto Rican charter described above.

However, in lieu of the injunctive-type standards and procedures contemplated by S. 125, we believe the structure of S. 1593 lends itself more appropriately to a provision under which agreements would be approved, without hearing, for a temporary period (e.g., the six-to-nine month period specified in the bill for normal processing of agreements) when the absence of such approval, in the Commission's opinion, would create serious trade/service disruptions.

Question. Unlike S. 125, there appears to be no mechanism in S. 1593 for the FMC to cancel previously approved agreements if it subsequently finds them inconsistent with the Act.

Should the FMC have this authority?

Answer. Yes. Please see our detailed discussion of this subject at pages 11 through 16 of our letter.

Question. S. 125 specifies that the FMC may prescribe the form and manner of filing agreements, and reject those not in conformity with its "procedural" specifications.

S. 1593, however, goes further and directs the FMC to reject agreements for failure to meet "substantive subjective standards" such as failure to contain provision for a "commercially reasonable limitation on membership" and "reasonable notice for withdrawal."

Thus, parties filing an agreement with the FMC under S. 1593 have two possible obstacles to overcome, i.e., rejection of their filing, and once it has been accepted for filing, a protest by opponents.

(A) Inasmuch as the FMC could reject a filing for substantive reasons, couldn't a proponent appeal such a rejection, and an opponent appeal the FMC's failure to reject?

(B) Even though S. 1593 shifts the burden of proof to opponents of an agreement, doesn't its rejection provisions create the possibility that ultimate approval could take longer than under S. 125?

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jurisdiction of this agency. Clearly defined statutory antitrust immunity would mean that the stated objective of regulation by a single Federal agency could be realized.

[3] See *Federal Maritime Commission* v. *Pacific Maritime Association,* 435 U.S. 40 (1978); *City of Los Angeles* v. *FMC,* 388 F2d 582 (D.C. Cir. 1967).

Answer. As we noted in our letter (pp. 10–11), the criteria for Commission rejection of an agreement under section 6(a) of S 1593 are inappropriate. The current requirements of section 15 of the Shipping Act pertaining to self-policing, right of independent action and the terms for conference membership and withdrawal from membership, generally involve issues of fact which require a hearing. To attempt to deal with such matters exclusively through the rejection process, as contemplated by S. 1593, may be subject to judicial attack on due process grounds. We have suggested alternative language for sections 5 and 6 (see p. 8 and p. 16 of our letter) to alleviate this problem. Otherwise, the situations which you cite in parts A and B of your question may result from the manner in which section 6(a) is now structured.

Question. S. 1593 expands the categories of state-controlled carriers exempted from regulation under the controlled carrier legislation enacted by the 95th Congress. Do you believe this expansion is consistent with the provisions and objectives of the controlled carrier act?

Answer. As we stated in our comment at pages 23–24 of our letter, the Commission recognizes certain technical problems with the additional exemption from the controlled carrier provisions of the bill. We also advised that the policy determination of whether or not this expansion of controlled carrier exemptions is desirable, is a matter for the Administration (i.e. the Departments of State or Transportation) to address.

Question. U.S. Carriers, U.S. ports in the northeast, and on-shore maritime labor are suffering because shipments of cargo from the U.S. which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates from an ocean carrier who picks up or discharges such cargo at a Canadian port, a practice which would be illegal in the U.S.

S. 125 would require a carrier to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its orgin or destination is the U.S.

Does S. 1593 have a similar tariff filing requirement; and if not, should it?

Answer. Section 3(12) of S. 1593 defines the term "ocean common carrier" as a "vessel-operating common carrier, . . . engaged in the transportation by water of passengers or cargo between the United States and a foreign country, whether in the import of export trade." The bill also defines "through transportation" as that transportation "by two or more carriers at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port." Section 9 of S. 1593 requires an ocean common carrier to file tariffs showing their rates between "all points on its own route and on any through transportation route which has been established." Under this language, it would appear that a vessel-operating common carrier which offers a transportation service between an inland point in the U.S. and a foreign point or port would be required to file its tariff at the FMC regardless of whether it used a U.S. or Canadian or Mexican port. Use of a U.S. port is not mentioned in the bill's language as a condition for the filing of tariffs showing a carrier's through transportation service in the United States. The bill, thus, would seem to encompass vessel operating common carriers which offer a through ocean transportation service between the U.S. and a foreign country but do not necessarily use a U.S. port.

However, we agree that S. 125 is far more specific in its inclusion of carriers operating through ports in adjacent countries. If it is the intent of S. 1593 to reach this type of movement, this should be made clear in the provisions of the bill, perhaps by the addition of language to S. 1593 similar to that set forth in section 102(5) of S. 125. This would avoid litigation on this issue.

Question. Sec. 14 of S. 1593 substantially broadens the FMC's existing authority to suspend tariffs by extending it to failure to comply with a "fact-finding" subpoena.

Would such authority in "fact-finding" investigations be circumscribed by the same due process safeguards as the FMC's current authority?

Answer. Section 14(c) specifically provides that the Commission must give "notice and opportunity for a hearing" before it may suspend a carrier's tariff for failure to supply information sought in discovery or by subpoena authorized under paragraph 14(a). This notice and hearing requirement would thus be applicable to suspension orders stemming from subpoenas issued in connection with Commission "fact-finding" investigations.

Question. Do you believe the extension of authority in S. 1593 is necessary or desirable?

Answer. As we stated in the Commission's letter (at p. 29), tariff suspension is a severe penalty and should only be used in the most extreme circumstances. Moreover, given the nature of fact-finding proceedings, it is highly unlikely that tariff suspension would ever be used in connection with such a proceeding. We may find that its value lies in its potential use rather than its actual exercise by the Commission since it may provide a powerful incentive to carriers and other persons to be more forthcoming with needed information. In this sense the authority under section 14 of S. 1593 is useful and desirable.

Question. Sec. 12(a)(b)(6) of S. 1593 prohibits a carrier from continuing "to impose any surcharge after the increase in costs or loss of revenues that were the subject of the surcharge have been recovered."

Couldn't this add to the FMC's workload by requiring it to conduct extensive investigations into a carrier's costs (including foreign carriers)?

Answer. While we support the concept of section 12(a)(6) of S. 1593 that a surcharge should terminate once its underlying cost event ended, the Commission has no effective means of enforcing it. The Commission does not currently receive financial data in support of surcharges filed in the foreign trades. We therefore recommend that the provision be deleted from the bill. If it is to be retained, the bill should also provide authority for the Commission to require detailed accounting data from those persons imposing a surcharge (see p. 27 of our letter).

Question. The FMC and carrier witnesses at last year's hearings testified that the standards for disapproval of agreements in S. 125 are sufficiently clear and precise to be applied.

S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory," or (II) "detrimental to the commerce of the United States."

Do you believe these two standards are sufficiently clear and precise so that all parties will know before they submit an agreement to the FMC what they can and cannot agree to do; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. As indicated in Chairman Green's prepared statement before the Subcommittee, the Commission believes that the "unjust discrimination" and "detrimental to U.S. commerce" standards are workable. The Commission, as well as persons submitting agreements for approval, will be guided by the precedents established by prior Commission decisions utilizing those standards, and by the legislative history that will accompany the new Shipping legislation. We note that the standards of section 6(b) fail to include authority to disapprove a proposed agreement for violations of the Shipping Act. We believe this authority is necessary and should be included. In addition, the authority of continuing surveillance over approved agreements is also extremely important to the ability of the Commission to ensure that the goals of Congress in enacting any new Shipping Act will be accomplished. We have suggested alternative language for section 6(b) of S. 1593 that should resolve our concerns.

Question. Would you give some examples of agreements which would be "detrimental to the commerce of the United States" under S. 1593?

Answer. Whether or not an agreement will be detrimental to U.S. commerce, as that standard appears in S. 1593, will depend on a number of factors: how the proposed agreement is structured; the economic and commercial reasons for the agreement; conditions in the trade existing at the time of filing; whether the agreement meets the requirements of the Act; and also how the agreement is subsequently implemented. The Commission has no preconceived ideas of what will or will not meet that standard. It is our statutory responsibility and obligation to make that determination on a case-by-case basis according to the facts that will be presented by the parties. (See page 8 of our statement and pages 11 through 16 of our letter.)

Question. S. 125 eliminates the *Svenska* test and removes the antitrust laws from liner shipping activities. It does not, however, attempt to stifle beneficial competition. Thus, for the FMC to approve an agreement, that agreement must be consistent with a policy of "encouraging the lowest possible stable freight rates which are commercially feasible and the highest quality service to shippers and consignees."

Under S. 1593, the FMC may only disapprove an agreement that is "unjustly discriminatory" or "operates to the detriment of the commerce of the United States."

My concern is whether, in an attempt to overrule *Sevenska*, etc., the standards for disapproval in S. 1593, would prevent the FMC from disapproving agreements which may prevent competition which is beneficial to liner ship operators and the shipping public.

Answer. Please see our comments both in Chairman Green's testimony and at pages 11 through 17 of our letter with respect to the supposed or intended effect of the deletion of the "public interest" standard and the *Svenska* test for approval of agreements. Your question raises an important issue that needs clarification. While deletion of the public interest standard and clarification of the antitrust immunity proposed by S. 1593, should end the "dual regulation" of the liner shipping industry by the antitrust laws and the Shipping Act, the bill's language would not, in our view, prevent the Commission from considering, under certain circumstances, the issue of competition as a means of achieving possible efficiencies in our trades. As we noted in our letter, the Commission did consider an agreement's effect on competition prior to the addition of the "public interest" test to section 15 in 1961. Competition on the one hand, and rationalization on the other, are methods of achieving commercial efficiencies. The Commission should not be precluded from considering either factor in evaluating an agreement.

Question. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conference. In many cases, however, the FMC has still approved them under its section 15 authority, and they have thus received immunity from the antitrust laws.

As I read S. 1593, however, it may not give antitrust immunity to many of these agreements because they may prevent competition from carriers outside of the conference.

Answer. Currently section 15 applies to agreements "controlling, regulating preventing, or destroying competition." Section 4(a)(6) of S. 1593 would apply to agreements between or among common carriers and others that "control, regulate or prevent competition among themselves." Also, under the "Prohibited Acts" section of S. 1593, section 12(a)(9), an ocean common carrier may not "engage in any practice designed to reduce or eliminate the participation of non-conference carriers." Since agreements typically affect not only competition among the members but also competition between the members of the agreement and those operating outside the agreement, the limitation of section 4(a)(6) is inappropriate. It may also operate to restrict a conference's antitrust immunity. We recommend that the clause "among themselves" be deleted from section 4(a)(6) (see p. 6 of our letter). In addition, the prohibition contained in section 12(a)(9) of the bill seems inappropriate and inconsistent with the concept of closed conferences and other possible arrangements which would be authorized by S. 1593.

Question. As I read S. 1593, the activities of non-vessel operating carriers would not be exempt from the antitrust laws.

Should they be treated differently than ocean common carriers?

Answer. As we noted in our letter (at pages 5-6), sections 4, 5 and 8 of S. 1593 make no reference to non-vessel operating common carriers since the sections use the term "ocean common carrier," a term which is limited to vessel-operating common carrier. The Commission does not believe that NVOCC's should be distinguished from vessel operators for purposes of the filing of agreements and eligibility for antitrust immunity. Such operators are currently required to file their agreements under section 15. Like vessel operators, NVOCC's take full responsibility for a shipper's cargo. They also provide an important transportation service for small shippers by providing a consolidation service for less-than-container-load shipments. Under the terms of S. 1593, a vessel-operating common carrier could enter into an agreement with a terminal operator that would be protected from the antitrust laws, but an NVOCC could not enter into a similar arrangement without risking an antitrust violation. Such a scheme—carving out an exemption to the agreements and immunity provisions of the bill for one maritime entity—is inconsistent with one of the important goals of the legislation to clarify the regulatory law applicable to the liner industry (see also our response to question #6).

Question. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill as S. 1593 provides might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril?

Answer. We cannot predict what effect the proposed changes will have on the attractiveness of such contracts to carriers and shippers, although an element of uncertainty may impede their use, at least initially. Currently, the Commission prescribes the form of dual rate contracts by rule (46 C.F.R. § 538) in accordance with the requirements of section 14(b) of the Shipping Act. Insofar as we know, this system has proved satisfactory and is working as intended. We are not aware that a need for changing the system has been demonstrated.

In addition, as we noted in response to question #6, this limitation seems inconsistent with the bill's obvious intent to draw a clear line between shipping and antitrust matters.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. Please see the Commission's comments at pages 19 through 21 of our letter where the subject of the need for and benefits flowing from the tariff system are discussed in some detail. Very briefly, we emphasize that an end to the requirement for ocean carriers to publicly file tariffs and strictly adhere to their terms would in effect spell the end to our current system of nondiscriminatory treatment of shippers. The larger shippers would probably benefit from the abolition of tariffs since they would be better able to negotiate more favorable rates, but would do so at the expense of the smaller exporter or importer. Common carriers provide a service that is quasi-public in nature. The rationale underlying the requirement that common carriers offer a transportation service available to all shippers on a nondiscriminatory basis is that access to such a service at competitive rates should not depend upon a shipper's market influence. This system aids the general commerce by facilitating the efficient flow of our imports and exports. It ensures that shippers here are not disadvantaged in foreign markets due to irregular or discriminatory transportation rates or practices. It also promotes fair competition among carriers in our foreign commerce.

Abolition of the system which requires that carriers make their tariffs publicly available and adhere to their terms would remove the most effective means of ensuring a nondiscriminatory ocean transportation system.

Question. It has been said that a provision in S. 125 established a policy in favor of intergovernmental maritime agreements and is therefore promotional in nature because it gives a presumption of approval by the FMC to any bilateral agreement which implements an intergovernmental maritime agreement.

Under S. 1593, the burden of proof to disapprove such a bilateral agreement would be on the opponents of the agreement.

It seems to me, both bills operate about the same in this respect, and that neither establishes a policy in favor of government bilaterals. What are your views?

Answer. We do not believe that the two bills would operate in substantially the same manner. Unlike S. 1593, S. 125 contains a positive statement that there is a presumption in favor of "agreements implementing intergovernmental maritime agreements."[4] The presumption in S. 125 would be appropriate if the terms of the implementing agreement were specifically required by the intergovernmental maritime agreement. It is our observation, however, that intergovernmental maritime agreements typically state only broad objectives and leave the terms of any implementing agreement to the carriers involved. There have been agreements filed with the Commission which purport to implement an intergovernmental agreement but which do not directly relate back to any specific requirements in the referenced intergovernmental maritime agreement.

Thus, it is our opinion that, when the terms of an implementing agreement are merely consistent with, but are not required by an intergovernmental maritime agreement, the agreement should be treated like any other purely commercial agreement filed with the Commission.

Question. Inasmuch as the FMC must approve bilateral agreements which implement intergovernmental maritime agreements, shouldn't the FMC participate in negotiation of the intergovernmental agreements to assure that the provisions agreed upon by the countries are capable of being implemented by bilaterals which are consistent with our shipping laws?

Answer. No, we do not believe that FMC participation in such negotiations would be appropriate. While the Commission is ready and willing to offer technical advice to those negotiating bilateral maritime agreements, we recognize that foreign policy and general trade considerations are of paramount importance in such negotiations. The present system of reviewing carrier agreements which purport to implement bilateral accords is adequate to ensure compliance with Shipping Act requirements. Moreover, as a quasi-judicial agency the Commission could expose itself to allegations of pre-judgment or bias with respect to related agreements later presented to the Commission.

This completes our response to the written questions submitted to the Commission. We appreciate the opportunity to present our views and stand ready to assist the Committee in any way we can. If you have any questions about the Commission's responses or if you require any further information, please do not hesitate to contact me.

Sincerely,

ALAN GREEN, Jr., *Chairman.*

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[4] For a discussion of burden of proof under S. 1593, see pages 16-17 of our letter.

Senator **Gorton**. The next witness will be Adm. James Holloway, president of the Council of American-Flag Ship Operators, and those who are accompanying him from his organization.

STATEMENT OF ADM. JAMES L. HOLLOWAY III, PRESIDENT, COUNCIL OF AMERICAN-FLAG SHIP OPERATORS, ACCOMPANIED BY W. J. AMOSS, JR., PRESIDENT, LYKES BROTHERS STEAMSHIP CO., INC.; WILLIAM B. BRU, CHAIRMAN AND PRESIDENT, UNITED STATES LINES, INC.; ROBERT E. O'BRIEN, PRESIDENT, MOORE McCORMACK LINES, INC.; DON ALDRIDGE, VICE PRESIDENT, DELTA STEAMSHIP LINES, INC.; AND BILL WILLIAMS, VICE PRESIDENT, AMERICAN PRESIDENT LINES, LTD.

Admiral **Holloway**. Thank you very much, Mr. Chairman. I am accompanied today by W. J. Amoss, Jr., president of Lykes Brothers Steamship Co., Inc.; William B. Bru, chairman and president of United States Lines, Inc.; Robert E. O'Brien, president, Moore McCormack Lines, Inc.; Don Aldridge, vice president, Delta Steamship Lines, Inc.; and Bill Williams, vice president, American President Lines, Ltd.

Mr. Chairman, CASO does have a prepared statement on S. 1593 which I would like to submit for the record. This statement is a brief one and it is brief because CASO fully supports the provisions of your bill. We think it is a very good bill, and in our judgment it is going to do a great deal to halt the decline in our flag liner industry. We are convinced that its enactment will be a powerful encouragement to fresh investment in the U.S. merchant marine.

Our prepared statement emphasizes a number of aspects of regulatory reform and I would like to briefly summarize these in a short oral statement, if I may, and submit our written, prepared statement for the record.

Senator **Gorton**. Your full statement will be included in the record.

Admiral **Holloway**. Thank you, Mr. Chairman.

Changes in the Shipping Act of 1916 are long overdue. Your consideration of the bills before you today is a significant step forward. Both S. 1593 and the regulatory reform provisions of S. 125 recognize the need for change in our shipping laws and policies.

We believe the proposed strengthening of the conference function will lead to a greater ability on the part of carriers to rationalize their services to achieve a significantly higher capacity utilization and enable them to share with shippers the resulting economies of scale.

We could not have expressed more effectively the absolute necessity for clarification and reformation of our shipping laws in this area than the chairman did in his statement accompanying introduction of S. 1593. As the chairman noted, clear antitrust immunity would be a major step toward the administration's goal of revitalizing our maritime industry by removing a significant handicap created by uneven enforcement.

The right to limit conference membership is a means by which shipowners can keep some balance between the supply of tonnage invested in serving a market and the demand for that service.

There are more than sufficient safeguards in the bill to guarantee the viability of nonconference competition as an alternative and to insure that conference carriers do not abuse this right or become lax in the performance of the service they render.

We concur with the principle that the burden of proof in a proceeding involving the issue of the approvability of agreements be on the party opposing the agreement. We agree with the provisions of time and procedures specified relating to the approval of agreements.

The provisions of S. 1593 go a long way toward achieving the purpose of an effective loyalty arrangement. It is necessary that a conference be permitted to implement a single contract covering the services offered by the conference, or it will lack the ability to insure that shippers do not so divide their traffic between conference and nonconference services that the expected benefits of rationalization will prove unobtainable.

We concur that conference agreements must engage the services of an independent neutral body to police the obligations of members. We also believe that nonconference carriers should have to submit to the same policing requirement as conference members. We do, however, believe there should be a lesser burden on agreements involving so little volume of traffic that the costs of such policing efforts would be clearly out of proportion to the benefits thereof.

We understand that representatives of U.S. freight forwarders will outline to this committee their reasons for favoring existing provisions of law regarding entry into and operation within the freight forwarding field. We would support this.

Mr. Chairman, you see evidence of CASO's full and strong support of your bill, in the presence here of these senior executives of our member companies, including three presidents. They are here today first to stress the importance of this legislation, and second to emphasize the depth of CASO's commitment to your bill. Now, as a panel, they would be pleased to answer any questions that the committee might put to them.

Thank you, Mr. Chairman.

Senator GORTON. Thank you, Admiral. Your statement claims that: "Closed conferences do not, in and of themselves, insure the availability of carriers to attain the full benefits of rationalization." What other conditions are necessary to permit effective rationalization?

Mr. AMOSS. Mr. Chairman, I believe that to permit the full benefits of rationalization, carriers should be able to have consortium agreements without hindrance, which in fact—and I am recalling earlier testimony on the uneven application of laws between U.S. and foreign carriers in the past. We have seen many examples in which attempts to have mergers and consortia by foreign carriers have escaped notice and comment, but on the part of American-flag carriers, have frequently drawn a lot of attention and even resulted in court actions to prevent, in which the Justice Department has joined. So I think that is an example of the kind of thing that, No. 1, has been unequally applied; and No. 2, it is also an example of the kind of thing that would be healthy for rationalization and the economies being brought into this industry that are most necessary on the American side.

That is just one example that comes to mind. There may be others that some of my colleagues can give you.

Senator GORTON. Perhaps they can, and you can go on, if you will, more generally to describe the tools of rationalization. For example, are revenue sharing and space sharing agreements valuable or are they essential?

Mr. O'BRIEN. Senator, to have true rationalization, you certainly have to have the opportunity of working out arrangements for scheduling so that there wouldn't be an overabundance of vessels and service being supplied to the particular trades. Other examples, of course you would probably have to have—well, you would have to have uniform rates so that there would be a consistency in the services offered to the general public.

Senator GORTON. Does anyone else wish to comment?

Mr. O'BRIEN. Revenue sharing and pools would be another aspect of true rationalization.

Mr. AMOSS. I believe you wanted some idea about revenue sharing and pools and how they worked, and whether they would be—in fact, revenue sharing and pools are in existence today with very—after very extreme examination and special permission. And I believe that the examples of revenue sharing and pools in trades where they are permitted stand as a very excellent example of the benefit that comes in most cases.

These arrangements have been worked out to keep a level of service in a trade that has otherwise been limited by foreign actions and foreign laws, and has restored into balance from being legislated almost out of a trade the American carriers' position. And it has been work out of that situation that has, in fact, resulted from revenue sharing and pools.

I believe that in this day, in which the cost of service and the cost of the assets that go to provide a service are so very great, that revenue sharing is a natural in trades that have the very limited amount of growth in terms of their tonnage, and that yet must benefit from the economies of new modes and the investment that is necessary for those new modes.

Mr. O'BRIEN. One other thought, Senator. It also greatly helps with respect to energy conservation, which of course is very important these days.

Senator GORTON. Leading off from that, do your vessels carry a relatively equal volume and value of export and import cargoes?

Mr. BRU. I think that depends upon the trade that you are serving. Some trades are very well balanced, such as the trade between the United States and Europe, both of them highly sophisticated, mature economies, and the trade is fairly well balanced in value as well as in tonnage. The trade between the Far East and the United States is not as balanced, certainly in value. The goods coming from the Far East are of much higher value than the goods going to the Far East. We are shipping primarily raw materials and such to the Far East and importing finished goods back. And I think that is true of a lot of the trades that we are in, where either one direction is finished goods and raw materials come in the other direction, or vice versa.

Senator GORTON. To the extent that you are not carrying full cargoes in either direction, do you expect the bill to aid you in achieving a more full capacity?

Mr. BRU. Yes, sir; we do.

Senator GORTON. You note, Admiral, that a conference's basic purpose is to provide: "Regular and sufficient service to accommodate the needs of commerce at fair and stable rates, and that it permits carriers to rationalize their services to achieve a significantly higher capacity utilization, and enables carriers to share with shippers the resulting economies of scale."

Congress in 1916 clearly determined that these aspects of the conference system were beneficial. Would these benefits still accrue if tariff filing and enforcement were totally abolished?

Admiral HOLLOWAY. Mr. Amoss will answer that, sir.

Mr. AMOSS. Mr. Chairman, I think that the answer to that is in the negative, and I believe that the idea of eliminating tariff filing extends, really, from a confusion of people who want to totally do away with regulation, which is a basically good thrust, and a failure to understand the relatively benign type of regulation that we have in tariff filing in the first place.

There is no way that one would know what rates are being charged in the trade other than by word of mouth or hearsay if we had no tariff filing, and that would get right to many of the most important aspects of the act, in terms of the obligations of the United States toward the shipping public in the Shipping Act.

I think that the idea that some great benefit is going to come simply because the rates that are charged in international commerce are not simply filed with the Federal Maritime Commission or some other agency if need be is a fallacy. There is almost no action other than a record of what is going to be charged for a shipment, and in addition it also insures the shippers that advance notice that is necessary for increases in rates, which are now statutorily defined.

And if you look through your own bill, you will find many instances in which the elimination of tariff filing would do a total disservice to an orderly and understandable cost array in international commerce.

Mr. O'BRIEN. I concur completely, Senator, with Mr. Amoss' remarks. I think without tariff filing you would make rebating the 11th commandment.

Mr. BRU. I would concur as well.

Senator GORTON. Would you expect—excuse me. What would be the likely dynamics of consultations between a conference and a shippers council? Would you expect to learn from a shippers council what sort of concessions you might consider to accommodate their views?

Mr. AMOSS. Well, I think that the consultation between a conference and shippers council would really be pretty much maintained at the level of the conditions of the trade, rather than at rates per se. Conditions of the trade might have some influence on rates, such as the availability of fuel oil, its pricing, and that sort of thing. But I think that if we look at the models of shippers councils and what they deal with, they don't deal necessarily with rates per se; they deal with factors that must be recognized sometimes in rates, and they keep the two bodies—shippers and carriers—very much in tune with each other's problems. And they are a two-way street. It is certainly not the carriers talking to the shippers council entirely, nor the other way around.

I am impressed with the way shippers councils have worked in those areas, mostly European and Australian, where they are in effect—and I think that much good could come of it if shippers want it. It is a question of whether some shippers want it, and why, and that we have to leave to the shippers.

But, in general, I believe that a great deal of very useful dialog could be conducted without fear of antitrust action, and under the kind of conditions where it would be assimilated into both organizations.

Senator GORTON. Thank you.

Senator Inouye.

Senator INOUYE. Thank you very much, Mr. Chairman. We have provisions in both bills which affect the scope of immunity from antitrust laws—S. 125 has a provision, and S. 1593, and the present law.

Which would you prefer?

Admiral HOLLOWAY. I would ask each of the presidents, perhaps, to comment on that, Senator.

Mr. AMOSS. I am going to step up and ask you if you could explain in a little bit more detail, Senator Inouye, to me, about the scope of immunity between the two bills, because it is not clear in my mind. And I would have to ask for some help.

Senator INOUYE. Well, both bills here—S. 125 and S. 1593—attempt to grant statutory immunity from antitrust laws. This is certainly a most crucial consideration. The very purpose of conference agreements is to discourage or control competition, whether within or without the conference. If the conference agreement prevents competition from outsiders, as under S. 1593, the parties to that agreement may be subject to the antitrust laws as well as the Shipping Act.

Is that what you prefer?

Mr. AMOSS. You are asking me that comparatively. I think, obviously, as a businessman, we would like to have absolute freedom; but speaking in terms of the interest of the community in general, I think that if we are going to be granted immunity it really has to have certain counterbalances to it.

Now, I am not sure that the way it was expressed in S. 125 wasn't equally good, because I just don't have that language in my head, and I probably should. I have to apologize for that. And if you could tell me what S. 125 provided that was different, I would be glad to try to answer that.

Senator INOUYE. Well, we didn't have that provision in S. 125.

Mr. AMOSS. So in other words, in S. 125 we had the immunity without the limitation that it could be breached and you could throw yourself back into the antitrust area?

Senator INOUYE. Yes.

Mr. AMOSS. I am almost inclined to take the fifth on that one, because I think that my answer would be self-serving. I would like to have immunity from everything.

Senator Inouye. Do you believe that the FMC should have authority to expedite and temporarily approve agreements within 45 days of filing, if the implementation of the agreement would prevent harm to the proponents and not injure outsiders?

Mr. O'Brien. Yes, sir.

Senator Inouye. Do you believe that the FMC should have the power to require filing of special reports as part of their investigative tool? For example, the FMC had an investigation made on the shipping of buses financed by the U.S. Government on Russian vessels. It's not a big thing, but do you think the FMC should continue to have this type of authority?

Mr. Amoss. Senator Inouye, I certainly do. I think this goes to the heart of what the FMC is charged with doing, which is to protect the shipping public and to see that the laws of the United States are maintained insofar as shipping matters are concerned. I very strongly think that they should have that ability.

Senator Inouye. The U.S. carriers and U.S. ports in the Northeast and onshore maritime labor are suffering because shipments of cargo from the United States, which would naturally be exported from U.S. ports, and vice versa for imports, are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes.

And among other things, this means a shipper can accept rebates, which would be illegal in the United States, from an ocean carrier who picks up or discharges such cargo at a Canadian port. Do you think that a carrier should be required to file a tariff with the FMC even if the cargo was loaded or offloaded at a Canadian port, as long as its origin or destination is the United States?

Mr. Bru. Yes, sir; we do. We believe that this puts the American carriers and carriers serving the Northeast ports in a legal parity with the carriers serving Canadian ports. It does not in any way stop the movement of cargo or hinder the movement of cargo through Canadian ports; it just has them file a tariff so that we all know what they are doing. It gets down to just about the same thought that we all have as to whether we should file tariffs at all with the FMC, and we feel that we should have some control, and be able to see what is being charged over the Canadian ports.

Senator Inouye. In the operation of closed conferences, do you think that deferred rebates should be permitted?

Mr. Amoss. Senator, it would certainly be a strong tool to bring support to the conference. I think that as long as we are going to limit the spread between contract and noncontract rates at 15 percent that something like that is indeed warranted.

I know that deferred rebates are a problem in U.S. law because of the bad odor that they achieved back in the 1920's and even before the 1920's. But I believe that a deferred rebate system really has worked equitably and properly when it is totally described and totally understood in a contract that is open, and open to all shippers; and that there is really nothing wrong with that type of deferred rebate system.

Like a lot of words in our language today, it probably ought to have another name to get any currency. But those are my views of it.

Mr. O'Brien. I think, Senator, if it was called a volume discount, it would probably fly.

Senator Inouye. We shall amend it accordingly.

I would like to ask you the same question that was asked the Chairman of the FMC. The Chairman of the FMC said that it would be desirable to have all laws relating to the industry, not just the regulatory laws, but all aspects, be equally and effectively applied to foreign and domestic interests, private or corporate or State.

Do you believe that our laws are being equally applied, and effectively applied, to all interests, domestic and foreign, private and corporate and State?

Mr. Aldridge. Senator, I think that the past history will show that the laws have not been equally applied. I think that the Americans have been at a disadvantage. I think the American conferences have been at a disadvantage. The foreigners have been able to rationalize. They have been able to engage in the use of consortia, as Mr. Amoss has pointed out. This, of course, makes them much more cost effective.

And I think what is overlooked here sometimes is that we as American carriers and members of American conferences are also competing against other sources of materials to the markets that we serve. And if we have to send 10 ships to do the work of 6, where these other areas can send just as many ships as required, that puts us at a distinct disadvantage.

Senator Inouye. In addition to that type of discrimination, can you cite others, because I think this committee should be concerned with all aspects of shipping.

Mr. Amoss. Senator, yes, there are many others that certainly make American law limited in its application to non-U.S. citizens and U.S. firms, such things as the location of documents, the ability to retrieve those documents—that relate to whether the laws are being observed or not, that relate more specifically to the very heart of competition between carriers. And this is not to say that because there is a difference that foreign lines or all or even substantially evading our laws. But it is to say that a great number are, and that it is a very serious thing in the marketplace when they are.

And just as a perfect example, let's take the question of rebates to shippers. If an American carrier is suspected of engaging in such a practice, all of his records, wherever they are located here and abroad, are subject to subpena, and can be had. As you well know, the records of foreign corporations are subject to subpena if they are in this country, and only if they are in this country, and there are blocking statutes. That is just one example. If you go down the scale, and dig into the whole area of the effects of our laws, you do get such things as pollution control safety standards, or the concept of safety standards as applied in the construction of vessels, and just any number of things.

As a perfect example, the awards of our courts to seamen are on the average 10 times for the same type of injury or claim what they are in most foreign courts. So yes, there are a lot of things. Some of them we can redress. Some of them we probably can't redress unless—and try to match off with efficiencies in another area.

Senator **Inouye**. Do you believe that the compliance with subpenas duces tecum should be a condition for foreign interests to do business in our ports?

Mr. **Amoss**. I have always advocated that. I think that is—although it comes down hard on many of my foreign colleagues, I think that if we should live by the same rules in this trade, that that should be a price of it. And I would certainly be willing to submit to the same thing from foreign countries for our company, and I am sure the other American carriers would, too.

Senator **Inouye**. Well, we are hoping that whatever we do, we will not put you people at a further disadvantage. So if you think we are doing this, I hope you will let us know. Thank you very much.

I do have some additional questions to submit for the record.

Senator **Gorton**. Both of us will submit questions to you in writing.

[The statement follows:]

STATEMENT OF THE COUNCIL OF AMERICAN-FLAG SHIP OPERATORS

Good morning Mr. Chairman and members of the Committee. I am Admiral James L. Holloway, III, U.S. Navy, Retired, President of the Council of American-Flag Ship Operators (CASO).

Accompanying me here today is a panel of senior executives from five companies that are members of CASO. They are: Mr. W. J. Amoss, Jr., President, Lykes Bros. Steamship Company, Inc.; Mr. William B. Bru, Chairman and President of United States Lines, Inc.; Mr. George F. Lowman, Chairman of the Board of Farrell Lines, Inc.; Mr. Robert E. O'Brien, President of Moore McCormack Lines, Inc.; and Mr. Spyros S. Skouras, Chairman and Chief Executive Officer of Prudential Lines, Inc.

CASO represents the majority of the U.S. flag liner companies serving the foreign commerce of the United States. Our member companies own and operate a modern and diversified fleet of break-bulk, barge-carrying, container and roll-on roll-off vessels. All of these ships are available under various programs for use by the United States during times of military emergency.

We are pleased to have the opportunity to appear before you today to offer our collective comment on S. 1593, a bill which would substantially revise the regulation of liner shipping in U.S. foreign commerce. Changes in the Shipping Act of 1916 are long overdue, and we are grateful, Mr. Chairman, that you have recognized this need and that Senators Stevens, Kasten and Inouye have responded by joining you in introducing this legislation.

During the last decade, representatives of our industry have often appeared before the Congress voicing concern about the dramatic decline in our country's merchant marine capability. Although it has not always been possible for the Congress or various Administrations to act forcefully on the problems that confront us, we have not let discouragement give way to hopelessness. It has been our consistent view that, over time, our elected leadership would recognize the importance of a strong merchant fleet to the national defense and international trade posture of the United States. Certainly, your consideration of the bills before you today is a significant step forward.

In 1969, the U.S. flag liner fleet ranked third in the world in terms of deadweight tonnage and sixth in number of vessels. By 1979, our fleet had dropped to eighth in terms of deadweight tonnage and thirteenth in number of vessels. During this period of decline, we have managed to modernize our fleet, particularly by the conversion of general cargo carriers to containerships and partial containerships and by construction of new intermodal vessels.

Nevertheless, our fleet continues to carry far less than the substantial portion of our country's foreign commerce called for by the Merchant Marine Act of 1936 (defined as 50 percent). In 1979, the last full year for which official figures were available, U.S. flag vessels carried only 27.5 percent of our liner trade, a reduction in three years from 30.9 percent, or eleven percent in market share.

We realize that the challenge of rectifying this dangerous imbalance rests primarily with those of us who manage our country's privately-owned merchant fleet and with those who even now are manning our ships and operating our facilities around the world. However, we must look to you for the restoration of a regulatory environment in which we may achieve the efficiencies and productivity necessary to improve our competitive position.

Our statement today will concentrate on S. 1593. In the 96th Congress our industry group testified under the aegis of the National Maritime Council in support of S. 2585 which has been reintroduced in this Congress as S. 125. Both S. 1593 and the regulatory reform provisions of S. 125 recognize the need for change in our shipping laws and policies. Both bills represent a complete rewriting of the Shipping Act of 1916, which we believe is the best way to deal with the problems of a 65-year old statute, the meaning of which has been diluted and confused by changing times, advancing technology, and altered interpretations.

The two bills differ principally in their approach to the problem. We believe that S. 125 would restructure the existing system but that S. 1593 would have the more significant effect of erecting a new structure, providing a system more comparable to those of most other countries engaged in international trade. Our preference is for S. 1593 because of the reduced and minimal governmental involvement in what are basically commercial concerns between buyers and sellers of an essential service. We think the provisions of S. 1593 constitute a realistic approach to responsible collective action by shipping conferences to fulfill their basic purpose of providing regular and sufficient service to accommodate the needs of commerce at fair and stable rates. We believe the proposed strengthening of the conference function will lead to a greater ability on the part of carriers to rationalize their services to achieve a significantly higher capacity utilization, and enable carriers to share with shippers the resulting economies of scale. Shippers should not have to support the higher cost of service far in excess of their collective need. Neither shipper nor carrier should be subjected to the inefficiency of low utilization of expensive capacity.

We recognize that the problems that have evolved over many years
tal regulation of liner shipping cannot be satisfactorily resolved by amending any single provision of law. This statement therefore addresses the basic issues involving conference structure and function, application of antitrust laws, collective shipper-carrier consultation, and FMC authority and function, providing specific comment concerning S. 1593's proposed treatment of these and associated subjects.

We make the following preliminary observations about S. 1593:

Bilateral maritime agreements are already in effect in many of our trades. The UNCTAD Code is expected to come into being in 1982, but many of the countries with which we trade have already adopted the provisions of the Code. These are separate and highly controversial issues. Although the Committee did not address them in S. 1593, this bill goes a long way toward removing some of the main sources of friction and conflict between ourselves and our foreign trading partners. Further, it eliminates a considerable part of the competitive disadvantage that we, the American-flag sector, have labored under for years. It is our judgement that the regulatory reforms included in S. 1593 will materially assist in the reduction of further erosion of the U.S.-flag liner industry and that its enactment will encourage new investment in the industry.

We would now like to discuss the specific provisions of the bill which we consider to be of primary importance.

ANTITRUST EXEMPTIONS

We could not have expressed more effectively the absolute necessity for clarification and reform of our shipping laws in this area than the Chairman did in his Statement accompanying introduction of this bill.

Court decisions beginning in the 1950's, together with administrative practices and decisions of the FMC which have followed, have resulted in almost total erosion of the original intent of Congress when it enacted the Shipping Act of 1916. Antitrust immunity and the doctrine of primacy of the Shipping Act over the antitrust laws have been lost. Industry practices which would previously have been lawful as within the scope of approved agreements, or if in violation of section 15 would have been subject to the penalty provisions of the 1916 Act, are now claimed to be subject to retroactive application of antitrust treble damage suits and criminal penalties. Carriers and conferences are unable to predict with any degree of certainty what actions might later be found to be in violation of the antitrust laws.

As the Chairman has noted, clear antitrust immunity would be a major step toward the Administration's goal of revitalizing our maritime industry by removing a significant handicap created by uneven enforcement. As U.S.-flag carriers, we are disadvantaged in meeting our competition in the U.S. international trade as a result of strong domestic enforcement of antitrust laws which cannot be effectively enforced against carriers domiciled overseas.

We vigorously support the intent of Section 8 in this regard.

LIMITATIONS ON CONFERENCE MEMBERSHIP

The right to limit conference membership is a means by which shipowners can keep some balance between the supply of tonnage invested in serving a market and the demand for that service. The consequences of both open trades and open conferences have been persistent over-tonnaging in U.S. liner trades, leading to the diseconomies of low utilization of expensive fixed costs assets and widely fluctuating rate levels that disadvantage the competitiveness and stability of U.S. commerce. Closed conferences do not in and of themselves ensure the ability of carriers to attain the full benefits of rationalization.

However, they are a step in the right direction which we feel would redress the competitive imbalance. There are more than sufficient safeguards in the bill to guarantee the viability of non-conference competition as an alternative and to ensure that conference carriers do not abuse this right or become lax in the performance of the service they render.

We agree with the key provisions that specify this right in Section 4(a)(7) and Section 5(c)(1) of S. 1593.

INTERMODAL RATEMAKING

The ability of combinations of carriers to establish through intermodal rates must be made clear and certain. The absence of clear authority in the current law ends up being a deterrent to the full and orderly development of an intermodal network.

We agree with the bill's treatment of this subject in Section 4(b).

SHIPPERS' COUNCILS

The establishment of Shippers' Councils is mainly the business of shippers. Should such councils be adopted, we are prepared through our conferences to establish jointly with such councils procedures to consult on matters of general principle. We must stress, however, as we consistently have, that neither shippers nor ourselves would want or intend that specific rate levels be dealt with in the context of the carrier/shipper council relationship. If the provision for Shippers' Councils remains in this bill, we urge adoption of the definition of Shippers' Councils, together with the scope of their permitted and prohibited activities as set forth in H.R. 4374.

BURDEN OF PROOF ON AGREEMENTS

We concur completely with the principle specified in Section 6(c) that the burden of proof in a proceeding involving the issue of the approvability of agreements be on the party opposing the agreement.

TIMING OF FMC DECISIONS

We agree with the periods of time and procedures specified in Section 6(e) relating to the approval of agreements.

LOYALTY CONTRACTS

The provisions in Section 7 are a step toward achieving the purpose of an effective loyalty arrangement. Subsections (4) and (5) address, in part at least, the basic problems of "right to route" and "natural routing". In addition, it is necessary that a conference be clearly permitted to implement a single contract covering the services offered by the conference or conference carriers will lack the ability to ensure that shippers do not so divide their traffic between conference and non-conference services that the expected benefits of rationalization will prove unobtainable.

INDEPENDENT NEUTRAL BODY POLICING

We concur with the provision stated in Section 5(c) that conference agreements must engage the services of an independent neutral body to police the obligations of members.

We also believe that non-conference carriers should have to submit to the same policing requirement as conference members. The principle that a filed rate is the only lawful rate that may be charged by a carrier in the commerce of the United States mandates that carriers be required to uphold the rates and rules their tariffs publish. We do, however, believe there should be a lesser burden on agreements involving so little volume of traffic that the costs of such policing efforts would be clearly out of proportion to the benefits thereof. In this regard we commend to you Section 310 of Senator Inouye's bill, S. 125, which would give the Commission discretionary authority to reduce policing obligations in these circumstances.

FREIGHT FORWARDERS

As with the section on Shippers' Councils, we will leave detailed discussion of this area to those most directly impacted. We understand that representatives of U.S. freight forwarders will outline to this Committee their reasons for favoring existing provisions of law regarding entry into and operation within the freight forwarding field. We would support this.

Mr. Chairman, we appreciate this opportunity to appear before your Committee to present this testimony and we will be happy to try to answer any questions which the Committee may have.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR GORTON AND THE ANSWERS THERETO

Question. (a) Are all of your members participating in conferences in all their trades?

(b) Where they are not, are they independents operating in competition with a conference?

(c) What sorts of trades have no conference?

Answer. (a) We believe there are isolated instances where a CASO member may not be participating in a conference in one of its trades.

(b) Yes, except in a trade which may not have a conference.

(c) As of a 1978 listing by the FMC of approved Section 15 agreements, there were in excess of 130 active agreements with rate-making authority filed with the FMC involving trades between various parts of the United States and foreign locations. Casual inspection of the trade areas described leads to the conclusion that most, if not all, areas of U.S. foreign trade served by ocean carriers are covered by agreements of this nature, the predominant form being conferences.

In general, such agreements can be expected in any trade where there are two or more carriers competing for the traffic and the volume of cargo involved is sufficient to induce rate-cutting that might be destructive to either shipper or carrier interests involved.

To our knowledge, this appears to be equally the pattern in non-U.S. shipping trade.

Question. Your statement highlights the general orientation of your members providing intermodal services on container, barge-carrying, and roll-on/roll-off vessels.

Do your expect significant further development in intermodal services in the near future that will compel agreements and tariffs designed to accommodate intermodalism?

Answer. We believe that intermodal services have already developed to the point where the ability of combinations of carriers to establish through intermodal rates must be made clear and certain. Questions of further development aside, the current potential of intermodalism cannot be fully realized absent such clear and certain authority. Indeed, significant further development in intermodal services would be frustrated.

We agree with the treatment of the subject in Section 4(b) of S. 1593.

Question. What will be the likely effect of the space-chartering agreement among 5 U.S. carriers approved by the FMC this past Thursday?

Answer. We consider that the space-charter agreement among the 5 U.S. carriers, FMC Agreement No. 10420, while potentially beneficial and productive of economies—will have only limited significance, since it provides for charter among the carriers only on a "space available" basis.

Question. Should the purpose of self-policing be limited to upholding the integrity of the agreement?

Answer. We believe the purpose of independent neutral body self-policing (of conference members and independents) is to uphold the provisions of the Shipping Act including, but not limited to, ensuring that the rate published in a carrier's tariff is the rate charged.

Question. (a) If independents were required to self-police, should they be required to engage the same neutral body as others in the trades?

(b) How would we guarantee protection of their records?

(c) How would proceeds from penalties be divided?

Answer. (a) It is essential that independent carriers be included in the neutral body self-policing requirement. In this regard, a certain amount of spot inspection as part of the policing function is essential to prevent the kinds of violations that are possible when a sealed container moves to port and then overseas as part of an intermodal movement.

We believe that it is feasible to require all carriers in a trade to engage the same neutral body.

(b) The question implies the obvious, that if self-policing is to provide the effective self-regulation desired, records in the possession of the independent neutral body must be confidental. Our members will be addressing this through their representatives.

(c) As with (b) above, this issue will be addressed by our members through their conference representatives.

Question. Granted that for some agreements involving low volume of traffic, the costs of self-policing would be relatively more burdensome. Is there any reason to believe that self-policing these agreements is any less important than where larger volumes are governed?

Answer. Self-policing is no less important in low volume trades than it is where larger volumes are involved. In most instances the basis of a neutral body policing mechanism exists and can be built on without involving prohibitive costs.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. S. 125 Specifies that the FMC may prescribe the form and manner of filing agreements, and reject those not in conformity with its 'procedural' specifications.

S. 1593, However, goes further and directs the FMC to reject agreements for failure to meet 'substantive subjective standards,' such as "failure to contain provision for a 'commercially reasonable limitation on membership,' and reasonable notice for withdrawal."

Thus, parties filing an agreement with the FMC under S. 1593 have two possible obstacles to overcome, i.e., rejection of their filing, and once it has been accepted for filing, a protest by opponents.

(a) Inasmuch as the FMC could reject a filing for substantive reasons, couldn't a proponent appeal such a rejection, and an opponent appeal the FMC's failure to reject?

(b) Even though S. 1593 shifts the burden of proof to opponents of an agreement, doesn't its rejection provisions create the possibility that ultimate approval could take longer than under S. 125?

Answer. Question (a) assumes that under S. 1593 an agreement cannot be "accepted for filing" until after the Commission has determined not to reject it under subsection 6(a) (which requires that agreements be rejected if they do not conform to the standards in section 5). We do not share that assumption.

Under S. 1593, the filing of agreements is governed by section 5(b), which provides simply that true copies "shall be filed" and requires the Commission to transmit a "notice of filing" to the Federal Register "(w)ithin 10 days *of receipt*" (emphasis added). In the context of this provision it would seem clearly intended that substantive consideration of an agreement—under both subsection 6(a) (which refers to the standards in section 5) and subsection 6(b) (which contains additional standards)—would occur in a single proceeding after filing.

We do not infer from the fact that the standards governing agreements are in two subsections that there would be two distinct proceedings before an agreement can become effective. To the contrary, the use of separate subsections seems to be a drafting decision that merely reflects that (i) the Commission must reject an agreement for failure to meet subsection 6(a) standards but is empowered to modify (as well as to disapprove) an agreement under subsection 6(b), and (ii) in the case of some agreements (e.g., amendments to a basic conference agreement that has previously passed muster under subsection 6(a)), the only relevant standards will be those in subsection 6(b). Thus, when subsection 6(a) as well as subsection 6(b) is relevant to a particular agreement the statute contemplates that the Commission will take the efficient course and consider both sets of issues in one proceeding. Thus, it seems unlikely that agreements could be delayed by separate appeals under subsection 6(a).

Question (b). S. 125 would not, in our view, be likely to result in quicker approval of agreements than S. 1593. In addition to the "form and manner" requirements of section 303, S. 125 sets forth substantive standards to govern agreements (in section 304, which requires consistency with the Act's declaration of policy) which would require Commission consideration just as would the substantive standards included in S. 1593. And the time limits for final Commission action on agreements are shorter under S 1593 (section 6(e)) than under S. 125 (section 307).

Question. Unlike S. 125, S. 1593 allows rate decreases to become effective upon publication and filing with the FMC.

(A) Won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

(B) Doesn't advance notice enhance the effectiveness of conferences by giving them an opportunity to respond to rate cutting by independents?

Answer. Section 18(b)(2) of the Shipping Act currently provides that rate changes resulting in a decreased cost to the shipper may become effective upon publication and filing with the Commission. Section 9(b) of S. 1593 would continue the same procedure. Section 405(b)(2) of S. 125 would mandate a 30-day delay between filing and the effectiveness of the lowered rate.

The principal impact of the change S. 125 contemplates would fall on U.S. shippers who, in trying to meet the landed cost competition of foreign sources of supply, would find no carrier in U.S. trades legally in a position to be rate responsive until 30 days had run. Everybody in U.S. foreign commerce, carriers and shippers alike, would lose that quantum of business that is capturable by keeping the system flexibly capable of meeting a near-term need. Were this mandated delay the rule, the pressures faced by carriers from shippers seeking premature application of rates already filed would be most onerous and would additionally be unequally felt as between conference and non-conference carriers. As a result of the neutral body policing system, conference members would be far more stringently exposed to discovery than independents who are not policed. U.S. flag carriers are not only almost invariably conference members but also suffer the additional disadvantage of having records fully exposed to subpoena by the Commission. Independents, almost invariably foreign flag, are in a position to violate their own tariffs with impunity doubly sheltered by the absence of neutral body policing requirements and the existence, in many cases, of blocking statutes enacting by other governments.

Question (A) raises the inference that immediate effectiveness of a revised rate would be discriminatory and that the parties by whom and on whose behalf the lower rate was filed would have an advantage. This is true for about the one day's advantage that is gained before other shippers and carriers can learn through various means including tariff watching services that a lower rate has been posted. Thereafter, the advantage is lost since any other shipper is entitled to the same rate and any other carrier may similarly decrease its rate.

Question (B) assumes that forestalling the application of an independent's rate for 30 days would give conferences some time to respond competitively. This would be of marginal value to conferences which position themselves to respond in timely fashion to outsider price competition, would provide no benefit to carriers commensurate with the loss of cargoes to be moved in U.S. commerce and would only expose carriers to the risks of being fined for applying an unlawful rate.

Question. S. 1593 removes the licensing requirement for independent ocean freight forwarders. S. 125 retains this requirement. Do you believe the FMC needs this authority?

Answer. In our statement, we left detailed discussion of this issue to those most directly concerned—the freight forwarders. We note that they have urged the Committee to retain the licensing requirement for independent ocean freight forwarders (see, e.g., the statement of William St. John, Jr. on behalf of the National Customs Brokers and Freight Forwarders Association of America). We endorse their views in this regard.

Question. Sec. 14 of S. 1593 substantially broadens the FMC's existing authority to suspend tariffs by extending it to failure to comply with a "fact-finding" subpoena.

(A) Would such authority in "fact-finding" investigations be circumscribed by the same due process safeguards as the FMC's current authority?

(B) Do you believe the extension of authority in S. 1593 is necessary or desirable?

Answer. (A) To the extent due process safeguards are constitutionally grounded, they are likely to apply in all cases where the Commission exercises its power of compulsory process. Likewise, Section 14, as now written, requires the Commission, "to the extent practicable", to conform to the Federal Rules of Civil Procedure and other rules common to Federal District Courts. Moreover, Section 14 requires notice and opportunity for a hearing before tariffs can be suspended for non compliance with a subpoena. In our view, Section 14 strikes the proper balance between the legitimate need of the FMC for subpoena power and the rights of those subject to such power.

(B) We do not oppose the extension of tariff suspending authority set out in Section 14, as long as full weight is given by the FMC and courts to the procedural safeguards contemplated by the Section. We particularly favor the provisions allowing Presidential review and mandating involvement by the Secretary of State where questions of foreign law are at issue. The latter provisions are particularly important in trades regulated by bilateral agreements negotiated by the Executive branch.

Question. Sec. 12(a)(b) of S. 1593 prohibits a carrier from continuing "to impose any surcharge after the increase in costs or loss of revenues that were the subject of the surcharge have been recovered."

(A) Couldn't this add to the FMC's workload by requiring it to conduct extensive investigations into a carrier's costs (including foreign carriers)?

Answer. The question makes a valid point. The mechanics of enforcement of this provision would require the FMC to investigate the cost of each carrier in the attempt to determine when a surcharge is no longer justified. On its face, in addition to needlessly increasing the FMC workload, this provision would simply create one more instance in which the U.S. carrier might be forced to comply with costly disclosure requirements which its foreign counterparts would simply ignore.

Moreover, there is a conceptual problem with this provision as well. In the case of a conference surcharge, the surcharge is imposed ot meet the generally agreed upon needs of the conference membership as a whole. Obviously, there will be some differential impact on the participating carriers because of different operating and cargo characteristics of each vessel in the trade. For conference surcharges then, the point at which an individual carrier has "recovered" the cost that is subject to the surcharge is really only relevant to the conference deliberation process. From a practical viewpoint, this provision is unenforceable in the conference environment because it is simply not possible to determine when the conference has "recovered" the cost at issue.

Question. The FMC and carrier witnesses at last year's hearings testified that the standards for disapproval of agreements in S. 125 are sufficiently clear and precise to be applied.

S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "Unjustly discriminatory," or (II) "Detrimental to the commerce of the United States."

(a) Do you believe these two standards are sufficiently clear and precise so that all parties will know before they submit an agreement to the FMC, what they can and cannot agree to do; and that the FMC will be able to apply the standards easily and expeditiously?

(b) Would you give some examples of agreements which would be "detrimental to the Commerce of the United States" under S. 1593?

Answer. The key factor relating to standards for approving agreements under S. 1593 should be establishment of legal precedent that U.S. antitrust laws do not apply when such agreements are considered by the FMC. Under these circumstances parties which might protest the filing of an agreement would be prohibited from subverting the policy goals of bill S. 1593 and the FMC's future interpretation of the six major policy goals of Gorton's bill.

As information, the FMC in its 19th Annual Report listed the following Sec. 15 criteria which it had taken from S. 2585:

> "(1) development and maintenance of an efficient, innovative, and economically sound ocean transportation system to meet the current and future needs of the United States foreign commerce;
>
> (2) protection of the rights of shippers, ports and consumers by the prevention of discriminatory, prejudicial, unfair or deceptive practices;
>
> (3) encouragement of the lowest possible stable freight rates which are commercially feasible and the highest quality service to shippers and consignees;
>
> (4) encouragement of exports from the United States to achieve and maintain a favorable international balance of payments;
>
> (5) comity with nations engaged in trade with the United States;
>
> (6) assuring the maintenance of dependable common carrier service responsive to the needs of exporters and importers in the waterborne foreign commerce of the United States; and
>
> (7) encouragement and support of a regulatory environment which furthers the national objective of the efficient use of fuel for energy conservation through cooperation among carriers, rationalization and similar arrangements."

These do not differ significantly from S. 1593 except for item seven on energy.

In the final analysis, while the FMC would have to develop more specific regulations to implement the policies of Congress under S. 1593, the present language would be acceptable provided antitrust laws do not apply in any evaluation standards.

Question. S. 125 eliminates the svenska test and removes the antitrust laws from liner shipping activities. It does not however attempt to stifle beneficial competition. Thus, for the FMC to approve an agreement, that agreement must be consistent with a policy of "encouraging the lowest possible stable freight rates which are commercially feasible and the highest quality service to shippers and consignees."

Under S. 1593, the FMC may only disapprove an agreement that is "unjustly discriminatory" or "operates to the detriment of the commerce of the United States."

My concern is whether, in an attempt to overrule svenska, etc., the standards for disapproval in S. 1593, would prevent the FMC from disapproving agreements which may prevent competition which is beneficial to liner ship operators and the shipping public.

Answer. We believe that S. 1593 policies are sufficiently clear and would enable FMC to approve and monitor agreements. For example, past decisions of the FMC suggest that a stifling of beneficial competition would, in the terms of the proposed legislation, "operate to the detriment of the Commerce of the United States".

Question. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conference. In many cases, however, the FMC has still approved them under its Section 15 authority, and they have thus received immunity from the antitrust laws.

As I read S. 1593, however, it may not give antitrust immunity to many of these agreements because they may prevent competition from carriers outside of the conference?

Answer. Section 4(A)(6) is somewhat ambiguous. It authorizes persons subject to the Act to agree to control, regulate or prevent competition "among themselves", the implication being that any agreement tending to minimize competition from others, e.g., independent carriers, not party to the agreement is unprotected activity. We do not believe this is the intention of those drafting this section since all of the permissible agreements set out in Section 4 could have a legitimate, but adverse, impact on the competitive position of those not party to the agreement. In fact, the entire trust of the Bill is to set clearly-defined limits within which such activity can take place. If antitrust immunity could be defeated simply by showing an agreement's adverse impact on the competitive position of any other person subject to the Act, the term would obviously had lost its meaning.

We believe the ambiguity could be corrected by redrafting Section 4(A)(6) as follows:

> "(6) enter into other agreements *among themselves* to control, regulate or prevent competition [among themselves]",

Question. As I read S. 1593, the activities of non-vessel operating common carriers would not be exempt from the antitrust laws.

Should they be treated differently than ocean common carriers?

Answer. We believe that the activities of non-vessel operating common carriers should not be exempt from the antitrust laws.

By virtue of their unique shipper/carrier status in the transportation chain, NVO's should not be accorded the same treatment under S. 1593 as the ocean common carriers. The definition of NVO's should be clearly distinct from that of ocean common carriers to ensure that their respective activities may be regulated separately.

Specifically, non-vessel operating common carriers should be required to post a substantial financial responsibility bond to ensure the performance of transportation services by a "carrier" who otherwise may have no capital investment in the ocean transport industry.

NVO's should be required to file and maintain tariffs describing services and rates published under the same conditions and subject to the same practices and procedures as may be applicable to ocean common carriers.

NVO's should not be permitted to attain anti-trust immunity through the formation of conferences and rate agreements among themselves; they should not be permitted to become members in ocean carrier conferences or rate agreements; and they should not be permitted to enter into joint service agreements with vessel operating common carriers or other NVO's.

Question. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill as S. 1593 provides might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril?

Answer. Although, under the provisions of S. 1593, loyalty contracts may be implemented without prior FMC approval as we do not believe this would necessarily have a "chilling" effect on their use. The requirements for such contracts as specified in Section 7 of the bill are clear and straightforward. In practice there should be little question whether or not a contract complies. We would suggest, however, that it be made clear in Section 7(b) that utilization of a contract not in conformity be treated as a violation of the Shipping Act only, as we are certain is the intent of the drafters.

Question. (a) It has been said that a provision in S. 125 establishes a policy in favor of intergovernmental maritime agreements and is therefore promotional in nature because it gives a presumption of approval by the FMC to any bilateral agreement which implements an intergovernmental maritime agreement.

Under S. 1593, the burden of proof to disapprove such a bilateral agreement would be on the opponents of the agreement.

It seems to me, both bills operate about the same in this respect, and that neither establishes a policy in favor of government bilaterals. What are your views?

(b) Inasmuch as the FMC must approve bilateral agreements which implement intergovernmental maritime agreements, shouldn't the FMC participate in negotiation of the intergovernmental agreements to assure that the provisions agreed upon by the countries are capable of being implemented by bilaterals which are consistent with our shipping laws?

Answer. (a) It appears to us that S. 125 establishes a limited policy in favor of Government bilateral agreements. Specifically, "(a) Whenever national policies of other nations might operate to exclude or otherwise discriminate against United States-flag operators in reciprocal trades with the United States, intergovernmental maritime agreements shall be presumed to be in furtherance of the declaration of policy set forth in section 101 of this Act." (S. 125, Section 903(a))

With respect to intergovernmental maritime agreements which are not in effect responses to shipping policies of other nations, S. 125 merely provides a framework, but does not establish presumption either for or against the negotiation of agreements. S. 1593, on the other hand, is by intention silent on the issue of bilaterals.

The CASO membership certainly favors the bilateral provisions of S. 125 as far as they go. But, as we pointed out in our testimony, we agreed with the tactics of leaving the bilateral issue aside to be addressed later on in the context of an overall maritime promotional policy.

(b) The composition of the negotiating team for an intergovernmental maritime agreement is really the province of the Executive Branch to determine. However, we strongly favor the provision of a technical advisory group to whatever agency of the Government is charged with the negotiation of such agreements. This certainly might include representation from the FMC. It should also, without question, include a technical advisory group representing the carriers concerned with the trade. Too often American negotiating teams in the international environment have been deprived of this kind of commercial backup while the negotiating team of the other country has the full backup participation of its effected commercial interests.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. It has been suggested by some, in line with the deregulation trend that prevails today, that tariff filing be eliminated for ocean common carriers. Proponents of tariff elimination (and the concept that the filed and approved rate is the only legal rate), point to the absence of tariffs in the European conference system. This argument overlooks the fundamental differences between common carriage philosophy and conference structure in the United States and abroad. Failure to recognize these differences is likely to lead to the destruction of the conference system in the U.S. trades. Equally important, it would lead to major alterations in the cost structure for U.S. imports and exports which would effectively exclude many small and medium size shippers and result in further concentration of market share in the hands of a few large companies.

First, as FMC Chairman Green has pointed out, the tariff filing requirement is the "backbone of the non-discriminatory common carriage system." A basic premise of U.S. common carriage law assets that similarly situated shippers, large and small, should have access to the common carrier system on an equal basis. Elimination of tariffs and the enforceability of tariffs would destroy this principle.

In the absence of the tariff system, the largest shippers would be able to exercise their market power at the expense of smaller shippers and U.S. commerce generally. Lacking the volume to force major rate concessions from carriers, small shippers would be placed at an obvious cost disadvantage in competing for export markets. This concern for the competitive rights of smaller businesses simply does not exist in the cultural heritage of Europe and Japan and is irrelevant to the economic and political goals of controlled economies and developing nations. In addition to being subject to blatant price discrimination and ad hoc rebating, smaller companies lacking large sophisticated traffic departments would find it impossible to predict shipping costs either in the short or longer term because of ensuing rate instability.

Carriers, in order to remain profitable, would be forced to raise prices to make up for revenue lost through rate concessions to the largest shippers. This would put small shippers at a further disadvantage. Perhaps more significant, it would operate to the overall detriment of U.S. foreign trade as these uneven rate adjustments would tend to make certain U.S. products (those not subject to the negotiation power of large shippers) less competitive in international markets.

It is also essential to recognize the difference between the way conferences function in the U.S. and non-U.S. trades. In any stable trading environment there is a balance of economic power between the provider and user of the product or service, in this case the carrier and the shipper. This balance is particularly critical in ocean shipping due to the enormous fixed cost component of providing the service. Because of this, the key to long term carrier profitability and low cost to the shipper is efficient utilization of the equipment, or rationalization.

In non-U.S. trades, stable, long term service to the entire trade on a given route is provided by the strength of the conference itself. This strength derives primarily from a strong tying device to bind shipper loyalty to the conference (usually a system of deferred rebates) supported by a sophisticated pooling agreement to inhibit destructive behavior by conference members and ensure adequate service This system deals effectively with the perennial problem of high value cargo skimming by independents which erodes the revenue base on which the conference relies to justify service to the full range of commodities moving in the trade.

In the U.S. trades the deferred rebate is and would remain illegal, as would certain other non-U.S. conference devices for enforcing order and stability in the trade.[1] Given this situation, elimination of the tariff system would shift the balance of power significantly in favor of large shippers (as discussed above) to the detriment of carriers, especially U.S. flag carriers, having a long-term commitment to the trade. Large shippers would be free to force significant individual rate concessions from conferences in certain instances, but would have no corresponding loyalty to the conference because of the absence of a strong tying device. The U.S. loyalty contract provisions, already ineffectual because of the absence of deferred rebates are further weakened by "right to route" and other provisions of U.S. law. So large shippers, while able to force concessions on certain volume movements, are still free to use independents where their limited service (usually high value skimming) is cheaper than the conference. The end result would be significant erosion of the revenue base of the conference carriers.

The CASO membership is generally in agreement that if, and only if, all the elements of conference functioning abroad were made available in the U.S. trades, the elimination of tariffs could be considered, but still the small shipper problem would remain. In the absence of all the features of the European system—absolute antitrust immunity for both carriers and shippers, deferred rebates, sophisticated pooling agreements and free ability to rationalize capacity in the trade—the abolition of the tariff system would ultimately destroy the conference system.

Question. I believe conference agreements, and pooling agreements, cargo sharing agreements, etc., among conference members have at times been regarded by the Dept. of Justice and/or the FMC as restricting or preventing competition from independents who operate outside the conference.

One provision of Sec. 4 of S. 1593, only permits agreements for economic cooperation among conference members which prevent competition among themselves. And, another Section of S. 1593, prohibits carriers from "engaging in any practice designed to reduce or eliminate the participation of non-conference carriers."

Another provision of Sec. 4, however, permits conferences to pool earnings, losses, or traffic.

(a) My question is: Does S. 1593 permit pooling agreements, and other agreements for economic cooperation among conference members inasmuch as these agreements may prevent competition from outsiders, and may reduce or eliminate the participation of non-conference carriers?

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[1] It is important to distinguish between the deferred rebate, which is a contractual system agreed upon by all members of a conference, which in effect strengthens the conference and individual, non-contractual rebating which tends to destroy the conference system.

(b) The FMC has approved space chartering agreements among Japanese carriers, and I believe recently approved a space chartering agreement among American carriers.

Inasmuch as space charter agreements are not specifically authorized under Sec. 4 of S. 1593, and inasmuch as these agreements may "prevent competition from outsiders" and/or "reduce or eliminate the participation of non-conference carriers," would they be authorized under Sec. 4 of S. 1593?

Answer. 13(a) It is clearly the intention of S. 1593 to permit pooling agreements and other agreements for economic cooperation among conference members.

The wording "among themselves" is contained in only one of seven categories of authorized conference activities, and the other permitted agreements and working arrangements are not so constrained. In our answer to question number 8, we have suggested this Section be amended to avoid ambiguity and reflect what we believe to be the intent of the drafters.

We do feel, however, that the provisions of this Act must be drawn as tightly and unambiguously as possible. In that regard, we would suggest that Section 8(a), (1) and (2) be amended as follows:

Substitute for the existing subsection (1) the following: "(1) any agreement or activity described in Sections 4, 7, 12, 17 and 18 of this Act.". Delete subsection (2) and renumber all following.

Your committee may receive other suggestions aimed at clarifying and strengthening this essential Section. We would be pleased to discuss them with you and your staff.

To further clear up any possible ambiguity, we recommend that Section 12(9) be amended to read "use of any fighting ship." These changes strengthen what we feel is the intent of the Act, that the penalties provided by the Act shall be the exclusive penalties applicable and that under no condition is reversion to the arena of antitrust allowed.

Finally, if intermodalism is to be effectively promoted by the Act, it is essentially to alleviate the reluctance of inland carriers to deal with ocean common carriers or steamship conferences in the establishment of through intermodal rates. This can be accomplished by adding at the end of Section 8(b), "except with respect to their participation in joint through intermodal and transportation rate arrangements, agreements, and tariffs with ocean carriers of conferences thereof in accordance with § 4(b) of this Act."

(b) The changes suggested above solve the problem with respect to space charters. We feel that a space charter is clearly in the category of an "exclusive preferential or cooperative working arrangement" authorized by Sec. 4(a)(5).

Question. S. 1593 repeals the *Svenska* test so that the FMC could not apply antitrust standards in disapproving agreements.

Moreover, under S. 1593, the Department of Justice could not be a party in any proceeding before the FMC to disapprove an agreement.

Yes, because of the limited scope of the antitrust exemption under S. 1593, many agreements might be subject to the antitrust laws.

Isn't it reasonable to assume that this statutory scheme will encourage the Department of Justice to invoke the antitrust laws in the courts, in cases where it now intervenes before the FMC and raises the *Svenska* test under the Shipping Act?

Answer. While we do not agree that the scope of any antitrust exemption in S. 1593 is meant to be limited, we are concerned that the language therein may not fully implement the stated intent of the Chairman in his introductory remarks to the bill. In this regard, we will answer questions number 8 and 13 above.

Senator GORTON. Admiral, we appreciate your being here today, and equally those of your associates. Our next witness will be Mr. Peter Finnerty of Sea-Land Service, Inc.

STATEMENT OF PETER FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS, SEA-LAND INDUSTRIES, INC., ACCOMPANIED BY WILLIAM J. COFFEY, SENIOR COUNSEL

Mr. FINNERTY. Thank you, Senator.

I would like to introduce for the record William J. Coffey, senior counsel with Sea-Land Industries, Inc., who has accompanied me here today.

If I may, Mr. Chairman, I would like to abbreviate my prepared remarks, on the understanding that the prepared text will be included in the record in full.

Senator GORTON. We would appreciate your abbreviating them, and your full statement will be included in the record.

Mr. FINNERTY. Thank you, Senator.

Mr. Chairman, we welcome this opportunity to appear before you and the subcommittee to testify in strong support of S. 1593. We wish to express similarly strong support for S. 125, the Ocean Shipping Act of 1981.

Enactment of S. 1593 will enable the Federal Maritime Commission to initiate a number of procedural changes which should both improve and lessen the regulation of international maritime commerce. These will benefit cargo owners and carriers alike.

Enactment of S. 1593 will also permit rationalization of services. A dictionary would correctly define it as a process of making things conform to reason, a bringing of order and sanity into a set of factors. In the liner shipping world, the absence of an ability to rationalize services because of Shipping Act and antitrust uncertainties is a serious U.S.-flag competitive handicap.

The enactment of S. 1593 will remedy this glaring defect and enable U.S.-flag carriers to properly enter into arrangements to coordinate use of facilities, vessel space, equipment, and terminals. Frequency and scope of vessel port calls could be made more efficiently.

Considerable conservation of expensive fuel could be achieved. Capital and operating expenses would be reduced. Our ability to offer an efficient and economical transportation service to our shipper customers will be greatly enhanced.

We cannot emphasize too strongly the importance of the several provisions in S. 1593 that will allow U.S.-flag carriers and conferences in U.S. trades to also rationalize their services.

Central to the bill is its grant of antitrust immunity to describe categories of conference and carrier activities and, in so doing, it's reestablishment of the primacy of the Shipping Act and of the Commission in the regulation of liner shipping.

Carriers can no longer be assured that agreements under which they operate, even after full consideration and approval by the Commission, are in fact immune from subsequent attack and drastic penalties under the antitrust laws.

We applaud the thrust of S. 1593 in the antitrust area and its declaration that certain activities are proper under the Shipping Act and therefore fully exempt from the application of the antitrust laws.

The penalties set forth in the 1981 Shipping Act for improper conduct are stringent but exclusive. The importance of these exclusivity provisions cannot be overemphasized. There are several issues that we suggest be clarified, either in the bill itself or in the legislative history which may accompany it.

Section 4(a)(6)—this paragraph contains words which are in the present Shipping Act, allowing agreements which control, regulate, prevent, or destroy competition. Regretably, however, two new words have been added, "among themselves," which will needlessly limit the scope of permissible activity under the new act and subject conference members to regular attacks under the antitrust laws from the Department of Justice and other economic interests.

The words "among themselves" would seem to open the doors for an attack on the agreement in every instance where a nonconference competitor feels disadvantaged. It is not an exaggeration to state that the inclusion of these two words in the bill could well lead to the destruction of all that you and the subcommittee are seeking to accomplish. We urge they be deleted.

Section 5(a)—this paragraph could be read as conflicting with the exemption provisions of section 8. We suggest that it either be deleted or modified to provide that in instances where a section 4 action has been taken, but not pursuant to a section 6 approved agreement, the penalties provided in section 15 should be the exclusive sanction involved.

Intermodal ratemaking, section 4(b) of the bill, is intended to allow conferences and individual ocean carriers to establish through transportation routes and through intermodal rates, and to have the filing of and adherence to through intermodal tariffs, subject to regulation by a single agency, the Federal Maritime Commission.

Parenthetically, it is our understanding that the enactment of S. 1593 would not confer economic or other regulatory jurisdiction over inland carriers upon the Commission.

We are, however, uncertain as to what regulatory jurisdiction is intended to insure that the intermodal rate, including the inland component, is in full compliance with the antirebating and controlled carrier provisions of the act.

Through routes and intermodal rates have been a growing feature of our international commerce since 1972, but there has continued to be some uncertainty about the regulation and permissible scope. S. 1593 must properly resolve this matter.

At present it is a regular business practice for ocean carriers to negotiate divisions of revenue and services with individual inland carriers. The role of the conference is a subsequent one and largely consists of agreeing to and publishing the through rates and routes.

The conferences do not involve themselves with operational decisions such as divisions of revenue, which are properly for individual carrier members to decide.

The confidentiality of such divisions between the modes should be maintained, consistent with comparable domestic regulatory practices. It may well be that S. 1593's grant of authority for conferences to engage in intermodal activities is broader than is actually necessary in light of today's business conditions.

Section 6(e)—we suggest that the 180-day standard be made absolute and that the Commission's authority to extend this time be deleted.

With respect to open conferences, the bill's authorization of closing conference membership is a marked departure from the 1916 act. At first blush, the idea of closing a conference is appealing and is a step toward bringing the United States into greater harmony with the way much of the world conducts its shipping business.

Indeed, it would confer legitimacy on present de facto practices in certain of our country's noncompetitive trades with Third World nations. Yet, in the much larger trades with industrialized nations, section 4(a) is probably meaningless.

There is ample competition from many outside independents in these trades, often resulting in overcapacity. Conferences here normally seek to recruit, not preclude, members. This closed-conference provision is hardly akin to the traditional foreign closed conference in which practices such as fighting ships, deferred rebates, and discrimination are commonplace and lawful and antitrust laws unheard of.

On balance, we believe this closed-conference provision should not be retained. It will undoubtedly be misinterpreted by shippers and provide a basis for opposition to the bill.

In most instances, it will not materially aid conferences or carriers. Sea-Land has long held that strong, competitive, open conferences having a competitive rate initiative capability are a most desirable competitive structure for shippers and carriers alike. In such instances, incentives to rebate are greatly lessened. Economies of scale can be obtained, and yet shippers may be fully assured of responsive conference pricing.

It is our view that a helpful mechanism for eliminating malpractices in the trade is a requirement that an independent neutral body police the obligations of all carriers in the U.S. foreign commerce, not just the conference and its members.

Additionally, with respect to the confidentiality of neutral body records, it is essential that their records be statutorially exempt from obligatory disclosure to any governmental agency. Without such a provision, the effectiveness of these neutral bodies would be greatly weakened.

Mr. Chairman, during the course of hearings on this bill, we believe that some discussion may arise as to the necessity of amending S. 1593 to include specific provisions pertaining to contract rates. It is our view that no such amendment is needed.

There is presently a rulemaking proceeding on this subject before the Commission, the record of which may be helpful to the subcommittee. In our view, the present responsibility should be continued. It is flexible in that it allows contract terms to be negotiated between shippers and carriers and yet requires a carrier to continue to meet his common carrier obligations.

In turn, this insures the smaller shipper the same protections as are offered to the larger shipper, a key in America's international transportation policy for the past 65 years.

Any change which would eliminate the antidiscrimination considerations would benefit only a select few shippers and operate to the disadvantage of the great majority of shippers who rely upon common carrier service. It would also have a major adverse effect on the conference structure.

We urge that section 14(a) be continued intact in the new Shipping Act of 1981. Our company is continuing to review the more technical provisions in the Shipping Act and comparable sections in S. 1593. With the act being 65 years of age, many of its words and phrases have taken on very precise meanings due to litigation and rulemaking proceedings.

This review should be completed shortly. And with your permission, we would like to submit a memorandum of our findings and recommendations to you within the next few weeks.

We appreciate the opportunity to appear here today and would be anxious to attempt to respond to any questions.

Senator GORTON. Mr. Finnerty, you stated at one point, in dealing with the conference system, that closed conferences are de facto in trades with Third World nations and innocuous in trades with industrial nations.

In addition, of course, you advocate strong conferences as providing an important measure of rate stability and service to the trades they serve and in lessening the need for Government regulation of the trade.

If strong conferences are good and if closed conferences are either innocuous or are de facto in existence, why do you maintain that a conference membership should continue to be open and that every member should have a right to independent rate action?

Mr. FINNERTY. Senator, I think that the main point with respect to the difficulties that the open conference system has experienced in the U.S. trades is related to the denial of true antitrust immunity and the advantages of full rationalization.

Without such a grant of an ability to achieve efficiencies of scale and to provide improved bases of service to shippers, the open conference system has—or is considered to be inherently defective.

The point that we are trying to make is that with the stronger antitrust immunity that both of the bills before us would grant to the conference system, the open conference system could achieve a much better performance in American trade.

And it is our feeling that it is not necessary—indeed, it may not be desirable, from the point of view of other considerations in the bill than just carrier efficiency, to go so far at this time as to authorize closed conferences.

Senator GORTON. Why do you believe that there are fewer incentives to rebate in an open conference than in a closed conference?

Mr. FINNERTY. We believe that there are fewer incentives to rebate in an open conference with a competitive rate initiative—that is to say, as long as conferences cannot be dominated by certain carriers with a substantial market share or certain other nationalistic controls over market share, a conference with a competitive rate initiative capability can remain responsive to the shippers who would otherwise be frustrated in not having their request for changes in service or changes in rates accommodated by a conference system.

Senator GORTON. How important is it for conferences to be able to establish intermodal through rates?

Mr. FINNERTY. It is essential. It is essential, Senator.

As we noted, in the last 9 years intermodal rates, along with the technological innovations, which have taken place in the liner trades, have become very widespread. Intermodal ratemaking is now, I would say, an absolute essentiality for the conference system to remain both competitive in the marketplace with independent lines and to provide the services which are demanded by importers and exporters.

Senator GORTON. When Sea-Land has negotiated divisions of revenues and services with individual inland carriers, has it had regulatory problems with either the Federal Maritime Commission or the Interstate Commerce Commission?

Mr. FINNERTY. I would say that the problem, to the extent that there have been difficulties, Senator, they have cropped up because of the ambiguities that have existed with respect to the statutory indications to the regulatory agencies as to exactly where each of the jurisdictions might begin and end.

As we noted in our comments, we think it quite important that the bill should clarify this point with respect to those aspects of through intermodal ratemaking.

Senator GORTON. And there is a reason for that clarification because these questions do arise?

Mr. FINNERTY. Yes, they do. And they have.

I would say that the FMC and the ICC, to my knowledge, have been discussing a satisfactory resolution of these difficulties. But it is important that it be addressed in the legislation.

Senator GORTON. In your testimony, you insist that

> Any change that would eliminate the antidiscrimination considerations would benefit only a select few shippers and operate to the disadvantage of the great majority of shippers who rely upon common carrier service.

Would this still be true if we authorized shipper's councils and export trading companies.

Mr. FINNERTY. I think that would be true if you authorized shipper councils. I would have to really think that over with respect to export trading companies, because the impact could potentially be far different. And it would require some give and take to find out exactly what you mean by that.

Export trading companies, some people have mentioned, could create a whole new influence on the trade relationships as we know them today.

Senator GORTON. If you wish to comment further on that in writing, you may do so.

Why would such a change be detrimental to the conference structure?

Mr. FINNERTY. I think that the underlying principle that strengthens the conference system and the efficiencies and stability of service which it can provide relates to the ability of the conference members to engage in an agreement, a stable uniform agreement as to the services and the rates under which the conference is going to operate.

If, under the law, we deviate from that principle and establish an ability in the statute for a particular carrier to deviate from the conference tariff on a wide-open basis, I think it significantly weakens the case for the conferences in a particular trade.

Senator GORTON. Senator Inouye.

Senator INOUYE. Thank you, Mr. Chairman.

Your response to section 4(b) of S. 1593 and listening to our reaction to it would suggest to me that there is justification for some clarification.

Do you have any language that you would like to suggest?

Mr. FINNERTY. We would be pleased to suggest some language, and we'll be happy to submit that, Senator.

I am reminded by counsel, Senator, that our proposed language to remedy the problem is included in the appendix to the testimony.

Senator INOUYE. Fine.

What would constitute an independent neutral body?

Mr. FINNERTY. Our idea of an independent neutral body, Senator, is the type of entity that is now prescribed by the Federal Maritime Commission by regulation and required for conferences and conference members. That same type of entity is the type of entity that we are suggesting should apply to all carriers in the trade.

Senator INOUYE. I have several questions that I would like to submit to you for your response if I may.

Mr. FINNERTY. Certainly.

Senator GORTON. And each of us will submit questions. There will be additional questions in writing. And we appreciate your comment.

I do want to say how much I appreciate your being here and the professionalism of the responses that you have given us so far.

Mr. FINNERTY. Thank you very much, Senator.

[The statement follows:]

STATEMENT OF PETER J. FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS, SEA-LAND INDUSTRIES, INC.

I am Peter J. Finnerty, Vice President, Public Affairs, Sea-Land Industries, Inc.

Mr. Chairman, we welcome this opportunity to appear before you and this Subcommittee to testify in strong support of S. 1593, the Shipping Act of 1981, a greatly-needed measure whose enactment will reinstate a single and exclusive framework in which America's international liner commerce is to be regulated. We wish to express similarly strong support for S. 125, the Ocean Shipping Act of 1981, which is also before the Subcommittee.

As a matter of record, our company and affiliates comprise the transportation group of R. J. Reynolds Industries, Inc. Most notable of our group is Sea-Land Service, Inc., the world's largest container transportation system, operating 44 U.S.-flag vessels without governmental subsidy. With 81,000 containers and 46,000 chassis, it serves 180 ports and cities in 52 countries. Total revenues for the Sea-Land group in 1981 are expected to exceed $1.6 billion.

In recent years, this Subcommittee has led the effort to identify and remedy regulatory obstacles which have greatly inhibited the proper development of America's international ocean trade and have contributed to the continuing decline of the nation's Merchant Marine. During 1980, the Subcommittee favorably reported S. 2585, a measure similar in many ways to S. 1593 and virtually identical to S. 125, which was unanimously adopted by the Senate. Regrettably, the legislative clock wound down before House consideration was completed.

Earlier, the Subcommittee led the way to enactment of the 1979 Shipping Act amendments which have greatly reduced the incidence of unlawful rebating and like practices in America's foreign trades. Similarly, the Subcommittee favorably considered and caused to be enacted the Controlled Carrier Act of 1978, a measure intended to require state-controlled carriers, notably those from Eastern-bloc nations, to observe economic rates and general marketplace rules as are adhered to by private enterprise carriers.

It is fair to say, Mr. Chairman, that for many years there has been broad, bipartisan support in the Congress for maritime regulatory improvement measures. What has been so lacking during this period, however, is an Administration with the ability and the leadership to take a firm stand, to assert a single voice, and to make the tough decisions that have so long been required. That picture, we all hope, has been changed dramatically during this past year.

President Reagan, both before and since his election, has spoken of the need for maritime policy reform. His designated spokesman in this area, Secretary of Transportation Drew Lewis, has clearly stated his agreement that legislation to revise the 1916 Shipping Act is necessary. Federal Maritime Commission Chairman Green has taken a similarly welcome and constructive stand.

This is a time, Mr. Chairman, when your initiatives and the dedicated efforts of this Subcommittee may at last be fully rewarded. It appears that we have what the space industry refers to as a "window", a definite but very finite aperture which must be promptly taken advantage of or forever lost. Our company is prepared to assist in every way necessary to assure a successful launching of the bills before you.

Let me now turn to S. 1593. In the interest of time, these remarks will concentrate on that bill, but I am prepared to discuss S. 125 as well, should the Subcommittee wish.

S. 1593 is a well drafted, modern version of the 1916 Shipping Act in almost all respects. It is no a revolutionary document, but one largely intended to place U.S. shipping policy back in step with the rest of the maritime world. This position is one which the U.S. occupied from 1916 until about 1957 when a series of Supreme Court decisions began to debilitate the venerable 1916 Act.

Enactment of S. 1593 will enable the Federal Maritime Commission (the Commission) to initiate a number of procedural changes which should both improve and lessen the regulation of international maritime commerce. These will benefit cargo owners and carriers alike.

Enactment of S. 1593 will also "permit cooperation among carriers and rationalization of services". Rationalization is a greatly misunderstood term. A dictionary would correctly define it as a process of making things conform to reason, a bringing of order and sanity into a set of factors.

In the liner shipping world, the absence of an ability to rationalize services because of Shipping Act and antitrust uncertainties is a serious U.S.-flag competitive handicap. The enactment of S. 1593 will remedy this glaring defect, and enable U.S.-flag carriers to properly enter into arrangements to coordinate use of facilities, vessel space, equipment, and terminals. Frequency and scope of vessel port calls could be made more efficient. Considerable conservation of expensive fuel could be achieved. Capital and operating expenses would be reduced. Our ability to offer an efficient and economical transportation service to our shipper customers will be greatly enhanced.

Our foreign-flag competitors have been able to rationalize their services for many years, an advantage denied to U.S. carriers by the Department of Justice. Many of our major competitors are, in fact, consortia of carriers, operating under agreements that give them the efficiencies and economies of scale which we so greatly need. We cannot emphasize too strongly the importance of the several provisions in S. 1593 that will allow U.S.-flag carriers and Conferences in U.S. trades to also rationalize their services.

I will not summarize the many particulars of S. 1593, Mr. Chairman, but would like to focus on the most important of its provisions. Also, taking advantage of your kind invitation for comments and suggestions, I will propose certain amendments intended to strengthen the bill. I hope they will be helpful to the Subcommittee in perfecting reform of the Shipping Act.

PRIMACY OF THE SHIPPING ACT

Central to the bill is its grant of antitrust immunity to described categories of Conference and carrier activities and, in so soing, its re-establishment of the primacy of the Shipping Act and of the Commission in the regulation of liner shipping. As mentioned before, Federal Courts, and the countless interventions before the Commission and the Courts by the Department of Justice, have greatly weakened the enabling statute of the Commission by which we are governed.

Between 1916 and 1954, the Shipping Act was clearly the law of the land for ocean liner shipping. Agreements when filed were to be assessed solely by its terms. Approval of an Agreement by the Commission, after thorough consideration and scrutiny, gave an absolute exemption from the antitrust laws to all activity carried out pursuant to terms of the Agreement.

In 1954, however, this very rational structure began to weaken. In the *Isbrandtsen* case, the Court of Appeals for the District of Columbia decided to inject the antitrust laws back into shipping activities. The decision gave rise eventually to the "public interest" test commonly associated with the *Svenska* proceeding commenced before the Commission in 1964 and decided by the Supreme Court of the United States in 1967.

Svenska, in turn, led quickly to the *Carnation* and the *Sabre* cases which further restricted the ability of carriers to operate effectively and with certainty under an approved Section 15 agreement. These cases have been relied upon by the Department of Justice in their numerous interventions before the Commission, each of which has been intended to nullify the antitrust exemption authority contained in the Act and administered by the Commission.

Why is this of such great importance? In very simple terms, carriers can no longer be assured that the Agreements under which they operate, even after full consideration and approval by the Commission, are in fact immune from subsequent attack and drastic penalties under the antitrust laws.

For a foreign-flag operator, domiciled abroad, this may largely be a matter of some inconvenience. For a U.S.-flag carrier, however, it is of critical importance, because it is only we U.S. carriers that have to suffer the full brunt of the Justice Department attack. Other nations have adopted blocking statutes and regulations, and take aggressive diplomatic measures to protect their flag carriers from Justice's unwanted and unwarranted intrusions. U.S.-flag carriers are afforded no such comfort. Indeed, this explains why Justice has regularly attacked agreements among U.S.-flag carriers before the FMC, but has turned a blind eye to the concerted activities of our foreign competitors on many many occasions.

We applaud the thrust of S. 1593 in the antitrust area and its declaration that certain activities are proper under the Shipping Act and therefore fully exempt from the application of the antitrust laws. The penalties set forth in the 1981 Shipping Act for improper conduct are stringent but exclusive. The importance of these exclusivity provisions cannot be overemphasized.

Within that broad expression of support, Mr. Chairman, there are several issues that we suggest be clarified either in the Bill itself or in the legislative history which may accompany it:

Section 4(a)(6).—This paragraph contains words which are in the present Shipping Act, allowing agreements which control, regulate, prevent or destroy competition. Regrettably, however, two new words have been added—"among themselves"—which will needlessly limit the scope of permissible activity under the new Act and subject Conference members to regular attacks under the antitrust laws, from the Department of Justice and other economic interests.

Let us suppose as an example that a group of carriers enter into an Agreement, in which they properly propose to fix rates, pool earnings and traffic, restrict sailings, etc., as is specifically provided in Paragraphs 1-5 of Section 4(a), and that the Agreement is duly approved by the Commission. Assuming it is efficiently operated, the indirect effect of the Agreement may well be to control, regulate and prevent competition not just among the members themselves, but to effect competition between the carrier members and non-members. Indeed, such effects would be inevitable.

The words "among themselves" would seem to open the doors for an attack on the Agreement in every instance where a non-Conference competitor feels disadvantaged. It is not an exaggeration to state that the inclusion of these two words in the bill could well lead to the destruction of all that you and this Subcommittee are seeking to accomplish. We urge they be deleted.

Section 5(a).—This paragraph could be read as conflicting with the exemption provisions of Section 8. We suggest it either be deleted or modified, to provide that in instances where a Section 4 action has been taken but not pursuant to a Section 6 approved agreement, the penalties provided in Section 15 shall be the exclusive sanction involved.

Section 8(a)(3).—This provision states that the antitrust laws shall not apply to any agreement or activity that applies solely to transportation services between foreign countries. We strongly support the provision, but urge that the record make clear its specific applicability to the following:

1. Instances involving the relay or transshipment of foreign-to-foreign cargoes at U.S. ports.
2. Instances involving the movement of foreign-to-foreign cargoes across the U.S. in a landbridge operation.
3. Instances of moving cargoes between a contiguous nation and another foreign nation via the United States.
4. Instances involving the movement of all cargoes between foreign countries, including U.S. Government impelled cargoes.

INTERMODAL RATEMAKING

Section 4(b) of the bill is intended to allow Conferences and individual ocean carriers to establish through transportation routes and through intermodal rates, and to have the filing of and adherence to through intermodal tariffs subject to regulation by a single agency, the Federal Maritime Commission. Parenthetically, it is our understanding that the enactment of S. 1593 would *not* confer economic or other regulatory jurisdiction over inland carriers upon the Commission. We are, however, uncertain as to what regulatory jurisdiction is intended to insure that the intermodal rate, including the inland component, is in full compliance with the anti-rebating and controlled carrier provisions of the Act. Through routes and intermodal rates have been a growing feature of our international commerce since 1972, but there has continued to be some uncertainty about their regulation and permissible scope. S. 1593 must properly resolve this matter.

At present, it is a regular business practice for individual ocean carriers to negotiate divisions of revenue and services with individual inland carriers. The role of the Conference is a subsequent one, and largely consists of agreeing to and publishing the through rates and routes. The Conferences do not involve themselves with operational decisions, such as divisions of revenue, which are divisions between the modes that should be maintained, consistent with comparable domestic regulatory practices.

It may well be that S. 1593's grant of authority for Conferences to engage in intermodal activities is broader than is actually necessary in light of today's business conditions. The appendix to my statement contains an amendment to Section 4(b) which may be helpful to you as your review of this important issue continues.

TIME RESTRAINTS

Section 6(e) of the Bill establishes a time standard within which the Commission is called upon to take final action on Agreements pending before it. Although this represents a dramatic improvement over the present open-ended system, we suggest that the 180 day standard be made absolute, and that the Commission's authority to extend this time be deleted. 180 days seem quite adequate, given the clear mandate and procedural requirements of the Act. We believe the extension provision will merely serve as an incentive to additional delay.

OPEN CONFERENCES

Section 4(a) of the Bill states that seven categories of activities upon which carriers and other persons subject to the Act may agree. The first six of these are contained in the present Act. The seventh, however, is a marked departure in that it would allow Conferences to close their memberships by precluding carriers from membership.

Section 5(a)(1) somewhat modifies this provision by stating that any such limitation on membership must be based on commercially reasonable criteria.

For Sea-Land, this is perhaps the provision in the Bill most difficult to assess. At first blush, the idea of closing a Conference is appealing, and is a step towards bringing the United States into greater harmony with the way much of the world conducts its shipping business. Indeed, it would confer legitimacy on present de facto practices in certain of our country's non-competitive trades with third world nations.

Yet, in the much larger trades with industrialized nations, the provision is probably meaningless. There is ample competition from many outside independents in these trades, often resulting in overcapacity. Conferences here normally seek to recruit, not preclude members. This closed conference provision is hardly akin to the traditional foreign closed Conference in which practices such as fighting ships, deferred rebates and discrimination are commonplace and lawful, and antitrust laws unheard of.

On balance, we believe this closed conference provision should not be retained. It will undoubtedly be misinterpreted by shippers, and provide a basis for opposition to the Bill. In most instances, it will not materially aid Conferences or carriers.

We wish to suggest an alternative to this provision for your consideration. Sea-Land has long held that strong, competitive, open Conferences, having a competitive rate initiative capability, are a most desirable competitive structure for shippers and carriers alike. In such instances, incentives to rebate are greatly lessened, economies of scale can be obtained, and yet shippers may be fully assured of responsive conference pricing.

As shippers have testified before Congress on many occasions, Conferences provide an important measure of rate stability and service to the trades they serve. A strong Conference will also lessen the need for government regulation of the trade since the independent neutral body policing mechanism, which I will discuss shortly, will become more effective as the conferences grow more viable.

NEUTRAL BODY POLICING

It is our view that a helpful mechanism for eliminating malpractices in a trade is a requirement that an independent neutral body police the obligations of all carriers in the U.S. foreign commerce, not just the Conference and its members. Section 5(b)(3) contains such a requirement for Conferences and members, but we believe it should be extended to include all competing carriers in a trade.

Additionally, there is a considerable controversy over the confidentiality of neutral body records. If these entities are to function as a fully effective mechanism and in the manner intended, it is essential that their records be statutorily exempt from obligatory disclosure to any governmental agency. Without such a provision, the effectiveness of these neutral bodies will be greatly weakened. It is also well to recall that given the number of major trading partner nations that have adopted blocking statutes, the ability of the Courts or of government agencies to obtain records under the law from neutral bodies will become severely limited, except again in the case of U.S. flag carriers. On the other hand, preservation of neutral body record confidentiality may encourage other nations not to raise obstacles to carrier cooperation with neutral bodies.

SCOPE OF COVERAGE

The stated goals in Section 2 refer to the need to foster reliable and responsible service by carriers, and to facilitate efficient and timely regulation of the various aspects of international liner shipping. In our view, these cannot be attained unless the definition of "common carrier" in Section 3(5) is amended to apply the Act to all parties within the United States who are arranging and providing ocean liner transportation to or from points in the United States. Our appendix suggests an amendment on this item which we hope can be favorably considered.

CONTRACT RATE AUTHORITY

Mr. Chairman, during the course of hearings on this bill, we believe that some discussion may arise as to the necessity of amending S. 1593 to include specific provisions pertaining to contract rates. It is our view that no such amendment is needed.

Under the present Act and we believe under S. 1593 as well, a carrier may be a common carrier and also offer contracts to shippers provided that such contracts not in any manner avoid the carrier's common carriage obligations. Both the common carriage and the contract arrangements are fully subject to the Act. There is presently a rulemaking proceeding on this subject before the Commission (Docket 80-54), the record of which may be helpful to the Subcommittee.

In our view, the present responsibilities should be continued. It is flexible in that it allows contract terms to be negotiated between shippers and carriers, and yet requires a carrier to continue to meet his common carrier obligations. In turn, this insures the smaller shipper the same protections as are offered to the larger shipper, a key in Amcrica's international transportation policy for the past 65 years. Any change, which would eliminate the anti-discrimination considerations, would benefit only a select few shippers, and operate to the disadvantage of the great majority of shippers who rely upon common carrier service. It would also have a major adverse effect on the Conference structure.

POWERS TO COMBAT FOREIGN DISCRIMINATION

Mr. Chairman, we are concerned about the proposed deletion of Section 14(a) of the 1916 Act and a lack of a comparable section in S. 1593. As a U.S.-flag carrier, we know all too well of the unfair prectices and discriminations engaged in by foreign-flag carriers in the foreign-to-foreign trades. Certainly, the ability of the Commission to influence these matters under the 1916 Act is limited, as is indicated by the absence of actions taken under the very broad authority now extended by Section 14(a).

Yet, we feel its deletion may give an improper and unintended signal to members of foreign-to-foreign Conferences, indicating that the United States will now tacitly condone the practices which this Section is designed to deter. It would represent a considerable setback to American efforts to engage in these trades. We urge that Section 14(a) be continued intact in the new Shipping Act of 1981.

SHIPPER COUNCILS

One provision in S. 1593 around which some controversy may arise is the matter of authorizing Shipper Councils. Our company views this as an issue to be thoroughly discussed by shippers, and thus we take no position on its inclusion in the bill. However, we do believe that the power of Shipper Councils should be limited to consultations, and not extend to actual negotiations with carriers.

TECHNICAL AMENDMENTS

Our company is continuing to review the more technical provisions in the Shipping Act and comparable sections in S. 1593. With the Act being 65 years of age, many of its words and phrases have taken on very precise meanings, due to litigation and rulemaking proceedings. This review should be completed shortly, and with your permission, we would like to submit a memorandum of our findings and recommendations to you within the next few weeks.

This concludes our testimony on S. 1593, Mr. Chairman, except to again express our strong support for the enactment of this bill. Let me also reiterate similar support for S. 125. I hope that our comments and suggestions, given in response to your invitation, will prove to be constructive and helpful. If I can assist in answering any questions, or if any additional information would be helpful, please let me know.

APPENDIX

AMENDMENT 1—PAGE 3, LINE 22

Add the following to Sec. 3(5): "Notwithstanding any other provision in this Act, the term 'common carrier' includes a common carrier or its agent or other representative within the United States that advertises, solicits, arranges, provides for, or otherwise participates or engages in the transportation by water, or by land and water, of property originating in or destined to the United States, directly or indirectly, between a United States port or point and a foreign country."

AMENDMENT 2—PAGE 8, LINE 6

Delete the words "among themselves" from Sec. 4(a)(6)

AMENDMENT 3—PAGE 8, LINES 6 AND 7

(a) Delete Sec. 4(a)(7).
(b) Delete "; and" from Sec. 4(a)(6) and place a period after the word "themselves".

AMENDMENT 4—PAGE 8, LINE 23

Delete the words "and negotiate" from Sec. 4(c)(3).

AMENDMENT 5—PAGE 9, LINE 2

(a) Delete Sec. 5(a).
(b) Renumber Sec. 5(b)-(d) accordingly.

AMENDMENT 6—PAGE 12, LINES 5 AND 8

(a) Delete the second sentence of Sec. 6(e).
(b) Delete ", or by the end of any extension period," from Sec. 6(f).

AMENDMENT 7—PAGE 10, LINE 6

Add the following paragraph to Sec. 5(c)(4).

"(C) On any anniversary date of the approval of an agreement, any two or more national flag lines that are parties to such agreement may file an application for a competitive rate initiative with the Commission, and the Commission shall, within ten (10) days require such agreement to be amended to provide that each carrier bound thereby has the right to take independent action on matters required to be in tariffs filed under Section 9 if:

(i) Such carrier requests that the agreement members approve a tariff amendment upon such matter and the amendment has not been adopted within a specified period of time, not less than thirty days thereafter; and

(ii) Such carrier, thereafter, gives the agreement members not less than thirty days notice that it is exercising independent action on the matter; and

(iii) The other agreement members have the right to take matching independent action to be effective on the same date or not more than ten days thereafter.

For purposes of this Section, the term "national flag line" means a common carrier by water in foreign commerce whose vessel or vessels, engaged in the transportation of passengers or property between the United States and a particular foreign country included with the scope of the agreement, are documented under the laws either of the United States or that particular country.

Any amendment made to an agreement pursuant to this Section shall expire on the next anniversary date of said agreement.

It shall be the duty of every carrier taking independent action under this section to comply with the tariff publication and filing requirements of Section 9 unless the agreement provides for compliance by other means. Whenever a rate becomes effective pursuant to independent action under this section, that rate shall be deemed to be the carrier's tariff rate under Section 7".

AMENDMENT 8—PAGE 17, LINES 8-10

(a) Delete the words "in a tariff" from line 8.

(b) Delete the words "due to inadvertence in failing to file a new tariff and" from lines 9 and 10.

AMENDMENT 9—PAGE 22, LINE 7

Replace the word "shall" with the word "may".

AMENDMENT 10—PAGE 29, LINE 11

Add the following new paragraph to Section 13:

"(f) Independent Neutral Body Records.—Notwithstanding any other provisions in this Act, an independent neutral body may not be compelled to provide access to or copies of any self-policing records, statistics, reports and other information to the Commission or other governmental body".

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR GORTON AND THE ANSWERS THERETO

Question. When you urge that antitrust immunity be clearly extended to the various examples of foreign-to-foreign commerce that pass through the U.S., do you suggest that these be or not be subject to filing of agreements and approval by the Commission?

Answer. We do not believe these agreements should be filed with the Commission. Foreign-to-foreign commerce should neither be subject to the Shipping Act nor to the antitrust laws.

Question. You insist that "Any change which would eliminate the anti-discrimination considerations would benefit only a select few shippers and operate to the disadvantage of the great majority of shippers who rely upon common carrier service."

Would this still be true if we authorized shippers' councils and export trading companies?

Why would such a change be detrimental to the Conference structure?

Answer. We defer to shipper spokesmen for their views on Shipper Councils. However, neither such Councils nor export trading companies would assist the small or medium size shipper in the event the Shipping Act's anti-discrimination provisions (Sections 16 and 17) were to be repealed. Common carriers should continue to be required to treat all shippers in an equitable manner.

The statement quoted in the question above related to contract rate authority. We have strongly supported the present procedures for entering into contract rates, as they allow terms to be negotiated between shippers and carriers, and yet require carriers to continue meeting their common carrier obligations.

Some other interests are advocating that contract rates and terms be considered as outside of the Shipping Act. If a carrier could avoid his obligations as a common carrier and as a Conference member merely by entering into a contract with a few large shippers, the Conference and common carrier systems would soon be destroyed.

Question. Even though foreign carriers and nations support self-policing because disclosure to the FMC raises problems of confidentiality, won't independents oppose self-policing in conjunction with a competing Conference for fear that their records won't be confidential in the hands of the neutral body?

Answer. We share this concern about confidentiality. As was noted in our September 21 Statement: "Additionally, there is a considerable controversey over the confidentiality of neutral body records. If these entities are to function as a fully effective mechanism and in a manner intended, it is essential that their records be statutorily exempt from obligatory disclosure to any governmental agency. Without such a provision, the effectiveness of these neutral bodies will be greatly weakened. It is also well to recall that given the number of major trading partner nations that have adopted blocking statutes, the ability of Courts or government agencies to obtain records under the law from neutral bodies will become severely limited, except again in the case of U.S.-flag carriers. On the other hand, preservation of neutral body record confidentiality may encourage other nations not to raise obstacles to carrier cooperation with neutral bodies."

Your attention is invited to the Appendix to our September 29 Statement. Amendment 10 of that Appendix contains our suggested language to remedy this problem.

Question. If contract rates are consistent with the Act and also with S. 1593, why is it not best to clearly permit them?

Answer. Contract rates should continue to be permitted. As was noted in our September 21 Statement: "Under the present Act and we believe under S. 1593 as well, a carrier may be a common carrier and also offer contracts to shippers provided that such contracts not in any manner avoid the carrier's common carriage obligations. Both the common carriage and the contract arrangements are fully subject to the Act . . . .

In our view, the present responsibilities should be continued. It is flexible in that it allows contract terms to be negotiated between shippers and carriers and yet requires a carrier to continue to meet his common carrier obligations. In turn, this insures the smaller shipper the same protections as are offered to the larger shipper, a key in America's international transportation policy for the past sixty-five years. Any change which would eliminate the anti-discrimination considerations would benefit only a select few shippers, and operate to the disadvantage of the great majority of shippers who rely upon common carrier service. It would also have a major adverse effect on the Conference structure."

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. S. 1593 repeals the *Svenska* test so that the FMC could not apply antitrust standards in disapproving agreements.

Moreover, under S. 1593, the Department of Justice could not be a party in any proceeding before the FMC to disapprove an agreement.

Yet, because of the limited scope of the antitrust exemption under S. 1593, many agreements might be subject to the antitrust laws.

Isn't it reasonable to assume that this statutory scheme will encourage the Department of Justice to invoke the antitrust laws in the courts, in cases where it now intervenes before the FMC and raises the *Svenska* test under the Shipping Act?

Answer. Section 8 of S. 1593 states that the antitrust laws shall not apply to any agreement or activity described in Section 4. These include agreements on rates; pooling of revenues and traffic; rationalization of port calls; limiting or regulating cargo volumes; and various exclusive preferential or cooperative working agreements. Although Section 4 may be viewed as being limited in scope, it is, in our judgment, sufficiently broad to encompass those agreements and activities which will enable U.S.-flag and other steamship companies to conduct their business in a far more certain and efficient manner than is currently possible.

Under these circumstances, and given the reasonably precise language of Sections 4 and 8, it is difficult to foresee situations arising in which the Department of Justice would be able to invoke the antitrust laws to challenge an agreement approved by the FMC. In that regard, S. 1593 represents an enormous improvement over the present Section 15—Shipping Act scheme.

Question. S. 125 specifies that the FMC may prescribe the form and manner of filing agreements, and reject those not in conformity with its "procedural" specifications.

S. 1593, however, goes further and directs the FMC to reject agreements for failure to meet "substantive subjective standards," such as "failure to contain provision for a 'commercially' reasonable limitation on membership," and reasonable notice for withdrawal.

Thus, parties filing an agreement with the FMC under S. 1593 have two possible obstacles to overcome, i.e., rejection of their filing, and once it has been accepted for filing, a protest by opponents.

(A) Inasmuch as the FMC could reject a filing for substantive reasons, couldn't a proponent appeal such a rejection, and an opponent appeal the FMC's failure to reject?

(B) Even though S. 1593 shifts the burden of proof to opponents of an agreement, doesn't its rejection provisions create the possibility that ultimate approval could take longer than under S. 125?

Answer. Certainly, the enactment of S. 1593 will not bring Shipping Act litigation to a halt. However, it will limit the FMC's grounds for rejecting an agreement, set reasonably precise criteria for the approved, and place the burden of proof on the party who is in opposition to the agreement. This seems to be a reasonable statutory scheme, and should keep litigation and regulatory delays to a minimum.

Sections 303 and 304 of S. 125 authorize the Commission to reject any agreement which is inconsistent with the form of this regulation, and further allows rejection of agreements which the Commission finds to be inconsistent with S. 125's declaration of policy. S. 1593's grounds for agreement rejection (Section 6) are not substantially different. In our opinion, the approval process under either bill would be about the same, and both would be far preferable to the present scheme.

Question. S. 125 provides for expedited, temporary approval of agreements within 45 days of filing, if its implementation would prevent harm to the proponents and not injure outsiders. S. 1593 has no such provision.

(A) Should the legislation we recommend contain one?

Answer. Given the time standards in Section 6 of S. 1593, the temporary approval provisions does not appear to be essential. However, such provision could enable the Commission to more efficiently regulate ocean shipping. We would not oppose the addition of a temporary approval provision to S. 1593.

Question. S. 1593 would deprive the FMC of power to require filing of special reports. The current Shipping Act (Sec. 21) and S. 125 give the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. We have interpreted Sections 101, 12, and 18 of S. 1593 as continuing the Commission's present powers to combat unlawful rebates and to enforce the Controlled Carrier Bill provisions. We are strongly opposed to any weakening of these powers, and agree that such a step would be interpreted as a signal that congressional concerns over rebating were being lessened.

Question. Unlike S. 125, S. 1593 allows rate decreases to become effective upon publication and filing with the FMC.

(A) Won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

(B) Doesn't advance notice enhance the effectiveness of Conferences by giving them an opportunity to respond to rate cutting by independents?

Answer. S. 1593 would continue this practice, which has been in effect since 1961. In some instances, it would be to the advantage of carriers to institute a period of notice for rate decreases as well, as is proposed by Section 406 of S. 125. However, on balance, the current practice affords carriers and shippers alike a fair measure of rate flexibility and we do not oppose its continuation.

Question. S. 1593 removes the licensing requirement for independent ocean freight forwarders. S. 125 retains this requirement. Do you believe the FMC needs this authority?

Answer. We support a continuation of licensing requirements for independent ocean freight forwarders, coupled with a flexible bonding provision that is related to an individual forwarder's geographic operating scope and traffic volume. Without such requirements, we are concerned that shippers will find themselves dealing with unqualified, financially unstable entities. The Commission should be authorized to continue and improve its regulation of these functions.

Question. S. 1593 expands the categories of state-controlled carriers exempted from regulation under the controlled carrier legislation enacted by the 95th Congress. Do you believe this expansion is consistent with the provisions and objectives of the Controlled Carrier Act?

Answer. We would prefer that there be no exceptions to the controlled carrier provisions of the Shipping Act. S. 1593 would add a sixth exception to the five already contained in the Act. Although it is a limited exception and would have very little, if any, effect on the operations of Sea-Land Service, it is a further and unnecessary erosion of the principle that State-owned and/or controlled carriers are required to compete with private enterprise carriers on an equitable basis.

Question. U.S. Carriers, U.S. ports in the northeast, and on-shore maritime labor are suffering because shipments of cargo from the U.S. which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates which would be illegal in the U.S. from an ocean carrier who picks up or discharges such cargo at a Canadian port.

S. 125 would require a carrier to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.

(A) Does S. 1593 have a similar tariff filing requirement; and if not, should it?

Answer. S. 1593 does not have such a requirement. As was noted in our statement made to the Subcommittee on September 21, "the stated goals in Section 2 refer to the need to foster reliable and responsible service by carriers, and to facilitate efficient and timely regulation of the various aspects of the international liner shipping. In our view, these cannot be attained unless the definition of 'common carrier' in Section 3(5) is amended to apply the Act to all parties within the United States who are arranging and providing ocean liner transportation to or from points in the United States."

The Appendix to that statement recommended the following amendment for the Subcommittee's consideration; "Notwithstanding any other provision in this Act, the term 'common carrier' includes a common carrier or its agent or other representative within the United States that advertises, solicits, arranges, provides for, or otherwise participates or engages in the transportation by water, or by land and water, of property originating or in or destined to the United States, directly or indirectly, between a United States port or pont and a foreign country".

Question. S. 1593 authorizes closed Conferences in an attempt to eliminate overtonnaging and inefficiencies in the U.S. trades. It prohibits the use of a major tool which enables closed Conferences to operate effectively, i.e., the deferred rebated.

(A) In the absence of the deferred rebate as a loyalty or tying device, how effectively do you believe closed Conferences can achieve their objectives under S. 1593.

Answer. S. 1593 would authorize closed Conferences, but we do not believe it generally would enable Conferences and carriers to operate effectively. Again as was noted in our September 21 statement to the Subcommittee: "At first blush, the idea of closing a Conference is appealing, and is a step towards bringing the United States into greater harmony with the way much of the world conducts its business . . . Yet, in the much larger trades with industrialized nations, the provision is probably meaningless. There is ample competition for many outside independents in these trades, often resulting in an overcapacity. . . . This closed Conference provision is hardly akin to the traditional foreign closed Conference in which practices such as fighing ships, deferred rebates and discrimination are commonplace and lawful, and antitrust laws unheard of."

Question. Section 14 of S. 1593 substantially broadens the FMC's existing authority to suspend tariffs by extending it to failure to comply with a "fact-finding" subpoena.

(A) Would such authority in "fact-finding" investigations be circumscribed by the same due process safeguards as the FMC's current authority?

(B) Do you believe the extension of authority in S. 1593 is necessary or desirable?

Answer. Section 14(a) is intended to enable the Commission to compel the production of information needed in investigations and adjudicatory proceedings. The authority contained in that Section is similar to Section 22 of the 1916 Act. Tariff suspension if, of course, a drastic remedy, but in certain instances it may be the only available one.

The provisions of Section 14(a) are stringent, but contain reasonable due process safeguards. They do not represent an expansion of the current Section 22 authority. We support the enactment of Section 14(a).

Question. Sec. 12(a)(b) of S. 1593 prohibits a carrier from continuing "to impose any surcharge after the increase in costs or loss of revenues that were the subject to the surcharge have been recovered."

(A) Couldn't this add to the FMC's workload by requiring it to conduct extensive investigations into a carrier's costs (including foreign carriers)?

Answer. It is our understanding that Section 12(a)(6) merely codifies the Commission's present regulations on the imposition of surcharges. These should, of course, be imposed for a specific purpose and limited duration. Section 12(a)(6) thus should not add to the Commission's present regulatory burden.

Question. The FMC and carrier witnesses at last year's hearings testified that the standards for disapproval of agreements in S. 125 are sufficiently clear and precise to be applied.

S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory," or (II) "detrimental to the commerce of the United States."

(A) Do you believe these two standards are sufficiently clear and precise so that all parties will know before they submit an agreement to the FMC, what they can and cannot agree to do; and that the FMC will be able to apply the standards easily and expeditiously?

(B) Would you give some examples of Agreements which would be "detrimental to the commerce of the United States" under S. 1593?

Answer. S. 1593's standards for disapproval refer to agreements that are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors. Additionally, they refer to agreements that operate to the detriment of the United States commerce.

We believe these standards are reasonably clear and precise, although the "detrimental to United States commerce" standard may well be redundant. Carriers will be unable to participate in agreements that, to a significant degree and without valid reason, subject certain entities to unduly discriminatory treatment. We do not anticipate any serious difficulties in meeting these standards.

We do not have any specific examples to cite of agreements that would be held as detrimental for the commerce of the United States. Presumably, such an agreement is one which its opponents have proven to be clearly contrary to the purposes of the Act as are set forth in Section 2.

Question. S. 125 eliminates the Svenska test and removes the antitrust laws from liner shipping activities. It does not however, attempt to stifle beneficial competition. Thus, for the FMC to approve an agreement, that agreement must be consistent with a policy of "encouraging the lowest possible stable freight rates which are commercially feasible and the highest quality service to shippers and consignees."

Under S. 1593, the FMC may only disapprove an agreement that is "unjustly discriminatory" or "operates to the detriment of the commerce of the United States."

My concern is whether, in an attempt to overrule Svenska, etc., the standards for disapproval in S. 1593, would prevent the FMC from disapproving agreements which may prevent competition which is beneficial to liner ship operators and the shipping public.

Answer. As is in our response to Question 12, the standards for disapproving agreement in S. 1593 are reasonably precise and clear. If an agreement before the Commission is one which is proven to lessen competition and to increase rate levels, the agreement could be approved or disapproved based upon the criteria quoted above. Such a decision would Undoubtedly be influenced by the purposes of the Act criteria contained in Section 2.

Question. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among Conference members (including pooling agreements, etc.) prevent competition from carriers outside the Conference. In many cases, however, the FMC has still approved them under its Section 15 authority, and they have thus received immunity from the antitrust laws.

As I read S. 1593, however, it may not give antitrust immunity to many of these agreements because they may prevent competition from carriers outside of the Conference.

Answer. This is a very significant problem which would be created by the enactment of S. 1593. As was noted in our September 21 Statement to the Committee:

"Section 4(a)(6).—This paragraph contains words which are in the present Shipping Act, allowing agreements which control, regulate prevent or destroy competition. Regrettably, however, two new words have been added—'among themselves'—which will needlessly limit the scope or permissible activity under the new Act and subject the Conference members to regular attacks under the antitrust laws from the Department of Justice and other economic interests.

"Let us suppose as an example that a group of carriers enter into an agreement, in which they propose to fix rates, pool earnings and traffic, restrict sailing, etc., as is specifically provided in Paragraphs 1-5 of Section 4(a), and that the agreement is duly approved by the Commission. Assuming it is effectively operated, the indirect effect of the agreement may well be to control, regulate and prevent competition not just among the members themselves, but to effect competition between carrier members and non-members. Indeed, such effects would be inevitable.

"The words 'among themselves' would seem to open the doors for an attack on the agreement in every instance where a non-Conference competitor feels disadvantaged. It is not an exaggeration to state that the inclusion of these two words in the bill could well lead to the destruction of all that you and the Subcommittee are seeking to accomplish. We urge they be deleted."

Question. It has been said that a provision in S. 125, establishes a policy in favor of intergovernmental maritime agreements and is therefore promotional in nature because it gives a presumption of approval by the FMC to any bilateral agreement which implements an intergovernmental maritime agreement.

Under S. 1593, the burden of proof to disapprove such a bilateral agreement would be on the opponents of the agreement.

It seems to me, both bills operate about the same in this respect, and that neither establishes a policy in favor of government bilaterals. What are your views?

Inasmuch as the FMC must approve bilateral agreements which implement intergovernmental maritime agreements, shouldn't the FMC participate in negotiation of the intergovernmental agreements to assure that the provisions agreed upon by the countries are capable of being implemented by bilaterals which are consistent with our shipping laws?

Answer. There is a clear need to establish a policy in favor of negotiating bilateral maritime agreements. We are hopeful that the Subcommittee will consider such a measure in the very near future. This is particularly urgent in light of the Code of Conduct for Liner Conferences, the UNCTAD—inspired treaty which is likely to come into force during the coming year.

The FMC needn't participate in negotiation of a bilateral maritime agreement. It could be accomplished adequately by the Executive Branch with adequate statutory direction.

Question. As I read S. 1593, the activities of non-vessel operating common carriers would not be exempt from the antitrust laws.

Should they be treated differently than ocean common carriers?

Answer. For purposes of Section 15 of the 1916 Shipping Act, NVOCC's are considered as identical to vessel operating ocean common carriers. We believe this philosophy should be continued.

Question. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill as S. 1593 provides might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril?

Answer. The loyalty contract provisions in Section 7 of S. 1593 do not differ significantly in substance from the dual rate contract provisions of Section 14(b) in the 1916 Shipping Act. Although we see no reason to alter Section 14(b). The enactment of Section 7 should not adversely affect the use of loyalty contracts.

Parties to a loyalty contract would seem less at their peril after enactment of S. 1593 than is the case under the present Shipping Act. Such contracts will clearly be exempted from the antitrust laws, if they meet certain criteria which are precisely set forth in Section 7. Under the circumstances, additional Commission review and approval would seem unnecessary.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. There are a number of likely adverse consequences which would follow elimination of the requirement to file and adhere to tariffs:

1. Discrimination would be rampant among shippers.
2. A gutting of the controlled carrier legislation, to the great advantage of the Soviet and Eastern bloc fleets.
3. Rebating would again become a common feature of American's foreign commerce, to the long-term detriment of carriers, shippers and government tax collectors alike.
4. The Conference system would be greatly weakened and perhaps destroyed.
5. In the short term, the resultant rate wars, rebates, etc. would likely be sufficient to bring about the demise of several U.S.-flag carriers, to the detriment of our national defense.
6. In the longer run, only the largest, financially stable carriers would survive, leaving our foreign liner commerce in far fewer, more foreign flag hands than is the case today.

Question. I believe Conference agreements, and pooling agreements, cargo sharing agreements, etc., among Conference members have at time been regarded by the Department of Justice and/or the FMC as restricting or preventing competition from independents who operate outside the Conference.

One provision of Sec. 4. of S. 1593, only permits agreements for economic cooperation among Conference members which prevents competition among themselves. And, another Section of S. 1593, prohibits carriers from "engaging in any practice designed to reduce or eliminate the participation of non-Conference carriers."

Another provision of Sec. 4, however, permits Conferences to pool earnings, losses on traffic.

(A) My question is: Does S. 1593 permit pooling agreements, and other agreements for economic cooperation among Conference members inasmuch as these agreements may prevent competition from outsiders, and may reduce or eliminate the participation of non-Conference carriers?

(B) The FMC has approved space chartering agreements among Japanese carriers, and I believe recently approved a space chartering agreement among American carriers.

Inasmuch as space charter agreements are not specifically authorized under Sec. 4 of S. 1593, and inasmuch as these agreements may "prevent competition from outsiders" and/or "reduce or eliminate the participation of non-Conference carriers," would they be authorized under Sec. 4 of S. 1593?

Answer. (A) Please see our response to Question 14.

(B) In our opinion, space chartering arrangements should normally be approvable under Section 4(a) (5) and (6) of S. 1593.

Senator GORTON. Dr. Henry de la Trobe and the CENSA group will be the next witnesses.

STATEMENT OF DR. HENRY DE LA TROBE, VICE CHAIRMAN, COUNCIL OF EUROPEAN AND JAPANESE NATIONAL SHIPPING ASSOCIATIONS, U.S. SECTION AND PRESIDENT, COLUMBUS LINES, ACCOMPANIED BY IAN ROSS-BELL, SECRETARY GENERAL; AND RONALD A. CAPONE, COUNSEL

Dr. DE LA TROBE. Mr. Chairman, it is a pleasure to have this opportunity to present the views concerning S. 1593 and S. 125 of the Council of European and Japanese National Shipping Associations, commonly known as CENSA.

I am Dr. John-Henry de la Trobe, chairman of the executive board of Hamburg-Sudamerikanische Columbus Line, a West German shipping company, and vice chairman of CENSA's U.S. affairs section.

I'm accompanied by Mr. Ian Ross-Bell, CENSA's secretary general, and our counsel, Mr. Ronald Capone.

We would like to submit a prepared statement with an appendix for the record.

Senator GORTON. That will be included in the record.

Dr. DE LA TROBE. S. 1593 deals exclusively with regulatory concepts which are also embodied in S. 125. Whereas the latter also addresses promotional matters, I will today most briefly summarize CENSA's views on the regulatory issues before your subcommittee.

Let me begin with applauding your statement to the Senate accompanying the introduction of S. 1593 when you noted, Mr. Chairman, that revision of the regulatory policies in the 1916 Shipping Act is a necessary part of any new approach to revitalizing the U.S. maritime industry. You acknowledged that many of these same measures can bring immediate benefits to U.S.-flag carriers and also to foreign-flag carriers serving the U.S. foreign trade and to U.S. exporters and importers who rely upon efficient and regular services and stable rates in ocean transportation.

CENSA is pleased to note this recognition that the U.S. liner policy directly impacts its membership in their participation as partners with the U.S. merchant marine in serving the needs of U.S. foreign commerce, which is equally the commerce of and of great importance to other trading partner countries.

Overall, S. 1593 is an excellent point of departure for bringing the regulatory structure of the 1916 Shipping Act into harmony with the container age and the realities of international ocean trade.

Mr. Chairman, CENSA is particularly encouraged by the fact that your bill emphasizes the need to achieve a competitive and efficient ocean transportation system by commercial means and wisely omits any protectionist or cargo-preference provisions which would be harmful to all interests.

CENSA fully supports the intent through S. 1593 of updating, restoring, and codifying the following important principles:

That healthy, effective conferences are essential in the U.S. ocean trades and that loyalty agreements reflecting commercially determined standards, together with uniform rates, terms, and conditions for through-intermodal movements, where agreed to among the members, are necessary adjuncts.

That conferences and carriers should be permitted quickly to implement commercially agreed upon arrangements to rationalize tonnage, services, and sailings through pooling and other cooperative agreements by imposing expedited and strict time requirements for administrative agency actions.

That agreements for concerted action should be approved unless shown to be unjustly discriminatory or unfair or detrimental to commerce and with burdens of proof regarding any such consequences to be borne by the party alleging them.

That limited membership or closed conferences are a sound commercial mechanism for achieving optimum rationalization of services.

That encroachment of the antitrust laws upon activities authorized under the bill or upon related commercial activities in other countries is inconsistent with the jurisdictional and economic complexities of international liner shipping.

That commercial self-regulation, including commercial resolution of disputes, should be emphasized and Government regulation minimized, and the regulatory process expedited.

That shippers councils have a legitimate role in consultative discussions with conferences on general rate levels, rules, practices, or services in ocean cargo movements.

That it is important to harmonize your shipping practices with those of your major trading partners.

While the provisions of the bill in large measure will achieve those overriding objectives, we respectfully suggest that there is a need to clarify the text in certain instances. Otherwise, in our opinion, some of the major objectives of the bill would be frustrated.

A detailed explanation in this respect is contained in the appendix which we urge your subcommittee to adopt. For example, the new standards in section 6(b) will eliminate the antitrust-laden public interest test in determining whether concerted action agreements are approvable. This relief is sorely needed.

Equally welcome is the general purpose of the antitrust exemption in section 8. However, as pointed out in our appendix, technical drafting changes should be made in section 8 in order to make clear that the entire antitrust exemption extends, as intended, to all activities regulated under the bill and all commercial activity abroad relating to shipping services in the U.S. liner trades.

It is perhaps not necessary to emphasize that commercially based ocean conferences and carriers necessarily serve trades of direct interest to at least two, and often more, countries. They operate in, and to survive, must bridge environments that are politically, economically, legally, and socially multinational and complex. They function in environments as to shippers and consignees where unilateral regulation and extraterritorial application of U.S. antitrust laws create most serious economic and jurisdictional problems—not solutions—stifling, instead of stimulating, better liner conference services without producing commensurate benefits for consumers.

CENSA warmly applauds the express authority coupled with antitrust immunity for through-intermodal services by conference members. Since the advent of containerization, intermodal services have become intimately related to the activities and viability of conferences. To realize the full potential of intermodalism, it is essential that conferences be able to offer uniform rates, terms, and conditions for through movement of ocean cargo.

We must explain that all we are seeking here is the right for conferences to set the through rates which the members will charge shippers who want to use conference through-intermodal service. There is no question of conferences negotiating rates with inland carriers. That will be left for the individual lines to do.

Finally, CENSA would like to address a concept on which you, Mr. Chairman, have invited comments, but which is happily absent from S. 1593—the mandatory right of carriers within a conference to exercise independent rate action.

Any such mandate would attack the very foundation of the conference system, which is to provide all shippers with agreed and reasonably stable freight rates and services. Independent action is a totally destructive weapon. It undermines healthy, efficient conferences and destabilizes rate and service structures.

As you emphasized in your remarks accompanying the introduction of S. 1593 on August 3, Mr. Chairman, the bill is intended as a serious vehicle for discussion. In that vein, CENSA's submission is intended to be constructive and supportive of the objectives you have set out to accomplish.

I trust our views will be helpful and that your mission will meet with the degree of success that this thoughtful beginning warrants. In this connection, we would very much appreciate the opportunity to supplement our prepared statement with additional views at a later date if further analysis of the bill and a review of others' recommendations suggest that a useful purpose might be served by doing so.

That concludes my statement, Mr. Chairman. However, my colleagues and I would be pleased to entertain any question the subcommittee may wish to ask, either for reply now or for subsequent written response.

Mr. Chairman, might I just ask if I might rely upon our Secretary General if I have difficulties to express myself correctly in your language. I will try to do my best.

Thank you for your courtesy in permitting us the privilege of this appearance.

Senator GORTON. You have done very well to this point, and of course you have permission to defer to one of the people accompanying you. We will be happy to have any further written communications you wish.

Dr. DE LA TROBE. Thank you, Mr. Chairman.

Senator GORTON. What do you feel to be the most important tools of rationalization? And especially I would like your comments on revenue pooling and cargo-sharing.

Dr. DE LA TROBE. Mr. Chairman, as you are aware, there are about 360 conferences all over the world which are nearly all closed conferences. There are all types of various conference agreements serving the needs of the different trades.

I think the most important item which brings conferences to rationalize is the enormous investment which is asked from ocean carriers in the container age for the future. The investment will be depreciated for a period from 14 through 16 years. We therefore think that it serves the need of the shippers, the exporters, and importers if we have the possibility to share our earnings and to rationalize our service by pooling agreements.

In general, if we are in a closed conference past performance has to be considered. But we consider also the reliability to provide ships, according to the trade and the country served. Then we allocate shares in purely commercial negotiation amongst ourselves. This can be a long process, but time has proven that in most trades out of Europe, we have agreed amongst shipowners what kind of share we allocate for everyone.

We then very often can offer the exact number of vessels which is necessary to serve a trade. We don't have overtonnaging in our European trades to the extent which obviously is here in the U.S. trades. And we think that is one important factor which keeps our rates in line and at a lower level than in many other systems—for instance, in the open conference system.

Senator GORTON. How important or prevalent are deferred rebates or rebates in general in closed conference trades not involving the United States?

Dr. DE LA TROBE. Senator, I would say that now in the modern container age, deferred rebates are not of the importance that they were in the past. We have in a closed conference a very strong relation between our shipper and our shippers' councils. We have established a system how we will handle things like deferred rebates, and we have a strong self-policing body.

We therefore think that the closed conference system does not favor rebating as much as an open conference system.

Senator GORTON. When carriers do rebate in non-U.S. trades, do they do so as a conference or independent of the conference?

Dr. DE LA TROBE. I would say in most cases they would do so independent, as carriers and not as a conference.

Senator GORTON. Generally, are closed conference trades also effectively closed trades? That is, do they lack any effective competition from independents?

Dr. DE LA TROBE. That, of course, depends on the trades. And as I have said, there are more than 360 conferences. But in general, Senator, I would say not many of the trades are really closed. Most of the trades are open in that—in the way that independents can operate. In effect, the independents are having a substantial portion of the trade in many of the conferences I know of, and there may be conferences or there may be trades where the conference would have 50 percent of the trade, and the other 50 percent would be divided among various independent carriers.

Senator GORTON. Will a closed conference that cannot utilize fighting ships, deferred rebates, and discriminatory pricing be able effectively to rationalize its services?

Dr. DE LA TROBE. The answer is yes. And may I just add that in my experience, which is only 15 years, I have never been able to find out where we have used a fighting ship. I think that was in the old times before the container age. I would hate to see one of my big container ships be a fighting ship.

Senator GORTON. Suppose we abolish tariff filing. Could a closed conference effectively rationalize under those circumstances?

Dr. DE LA TROBE. Well, Senator, that is a very difficult question. We have lived here in the United States with the tariff filing requirements. If you would ask us to give an answer on the question, should the tariff filing be abolished, I think we would have to know the total of the regulatory package.

Of course, as you are aware, tariff filing with a public body is not a requirement in non-U.S. trade. All that is required in other trades is that the tariff must be available in written form at a reasonable cost to any interested party.

I think we, as CENSA, have accepted the tariff filing requirement here because it is part and parcel of the antitrust immunity. If that necessary immunity was granted in full, in accordance with your bill as clarified in our appendix, without the requirement to file, then this, in our opinion, would bring procedures in the United States more into line with what is done elsewhere in the world.

But you must appreciate that in trades in other parts of the world, we are not confronted with so many requirements and prohibitions which exist under your law.

And by the way, a point that needs particular evaluation is the implication of tariff filing on section 10, which deals with State-controlled carriers. We wholly support that section, and we only wish our own governments would have similar legislation.

But I think this would need special attention in your bill.

Senator GORTON. Thank you. I have a number of other questions, but in the interest of time, we will submit them to you in writing and hope that you will comment on them.

Senator INOUYE. Sir, has the Justice Department of the United States ever invoked any provision of the U.S. antitrust laws against any of your members?

Dr. DE LA TROBE. Of course. I am just in the process of having a civil investigation demand myself, in my company, Senator.

Senator INOUYE. Do you believe that your members should comply with subpena duces tecum issued by the FMC or the Justice Department?

Dr. DE LA TROBE. I can answer this question twofold. First of all, I think that is a matter for the Government to decide. But I do think that many of the members of CENSA would, on a private basis, if they were not required by their government to ask for permission, submit papers, because I think, in most cases the members have the feeling that they have done nothing wrong.

Mr. ROSS-BELL. Senator, could I just add a comment to that?

What CENSA is most concerned about is that the laws of the trading partners should not conflict, that the ground rules should be the same. We have much sympathy with our American colleagues, who have just testified to this effect. We are not seeking any different advantage to our American competitor colleagues.

What we want is the laws, the ground rules, to be the same, and to be able to operate in a normal competitive environment. And as we understand it, this is what S. 1593 will largely achieve.

Senator INOUYE. Are the laws equally applied at the present time?

Mr. ROSS-BELL. I don't think the laws are equally applied, in the sense that, as our American colleagues have just said, we are able in Europe to merge, to form consortia, joint service agreements, and then to come into your trades and operate in a merged form, in a stronger form. Now, our American colleagues are not able to do this, as far as we understand it, because of the application of your antitrust laws.

Senator INOUYE. Should your ships be permitted to use Canadian ports for export or import purposes, and thereby avoid our laws?

Mr. ROSS-BELL. I think that really is a question for the Governments of the United States and Canada to resolve. We are simply the traders in between. We will seek for cargo where we can.

Dr. DE LA TROBE. And we will try to obey the laws, if we know how they are.

Senator INOUYE. In your early remarks, you used a phrase "cargo preference and other protectionist laws." For someone who may not be too familiar with the industry, they might conclude that we are the only ones with protectionist laws and cargo preferences. Is that the fact?

Dr. DE LA TROBE. Not at all, Senator. There are several countries in the world who apply cargo preference laws, but I think the United States is still holding up the banner of free enterprise. And we think that it would be a disastrous example if the United States would go for cargo preference, and therefore exclude free competition in that area, to a great extent.

Senator INOUYE. Do you think the United States should be able to operate freely in those countries that have cargo preference and protectionist laws?

Dr. DE LA TROBE. I think it might be a last resort, even for a country like the United States to apply cargo preference if, on the other side, you have a country which does not open their borders the way the United States does, and which gives great incentives to exporters and importers, if they use their national flag.

Senator INOUYE. The National Maritime Council of Washington, D.C., published a document entitled "The American Maritime Industry," dated 1980. In this publication, in the appendix they describe the cargo reservation laws and other discriminatory practices enacted by foreign nations for their national flag carriers as of 1979. I think it includes just about every nation on the map.

Do you think that these laws that are set forth in this appendix should be considered seriously by the United States? I am assuming you have read this.

Dr. DE LA TROBE. This is a very important issue. There has been a lot of discussion going on in the past, and it involves the United

Nations code. I think, to give you a really good, substantiated answer, we would have to think a little bit about it. Could we reply to that in written form, Senator?

Senator INOUYE. You suggested in one of your responses that, if it weren't for restrictions set forth by the nations, individual members would be very happy to submit their documents, because no one has done any wrong.

I have been led to believe that rebates are rather widespread in the world. Is my impression wrong, sir?

Dr. DE LA TROBE. I think that your impression may be right, but I still would believe that most of the documents which are asked for could be submitted by the member lines.

Mr. ROSS-BELL. Could I just add something to that, Senator?

That is that, in our experience in worldwide trade, the tighter the control of the conference, the lesser the incentive to rebate. It doesn't wipe out rebating. Rebating does exist. But a very substantive factor in controlling it is the tightness of the control of the conference. If the conference is a rationalized, closed conference with a pool—a cargo-sharing pool—then the incentive to rebate is simply not there.

Therefore, our experience is the tighter the control, the more possibility for the conference to rationalize, the lesser the problem rebating is.

Senator INOUYE. Should we be concerned with countries that either encourage or legalize rebates by their laws?

Mr. ROSS-BELL. I don't think any countries actually encourage rebating. Rebating, in other parts of the world, is left to—it is not illegal; but rebating done in conferences is in violation of the contractual agreement which the conference members have entered into with each other.

As we have heard previously, there are various procedures, like self-policing, which are used by the conferences to try and control this, and penalize it when it is encountered.

Senator INOUYE. You suggest by your answer that if the closed conference is tightened, the incentive for rebates would be minimized. Is that correct?

Mr. ROSS-BELL. Yes.

Senator INOUYE. On the other hand, if these closed conferences come out with artificially high tariffs, won't that be an incentive to rebate?

Mr. ROSS-BELL. In practical terms, the conference is subject to competition from all sorts of different sources. First of all, when it wants a rate increase, it has got to justify this to the shippers council; and this is often a lengthy and difficult problem. But it is usually achieved with not, perhaps both sides getting entirely what they want.

Second, if the conference does have a tariff which is too high, that is a wonderful umbrella for independents and outsiders and entrepreneurs to come into the trade—and they will, and they do.

Senator INOUYE. I have several questions that I would like to submit for your response in the record, if I may.

Senator GORTON. Thank you very much, Dr. de la Trobe; and thanks to your companions.

[The statement follows:]

STATEMENT OF DR. HENRY DE LA TROBE ON BEHALF OF THE COUNCIL OF EUROPEAN AND JAPANESE NATIONAL SHIPOWNERS' ASSOCIATIONS

It is a pleasure to have this opportunity to present views concerning S. 125 and S. 1593 on behalf of the Council of European and Japanese National Shipowners' Associations, also known by the acronym "CENSA". An abbreviated version of this statement will be presented in oral testimony before the Subcommittee on September 21 by Dr. John de La Trobe, Vice Chairman of CENSA's U.S. Affairs Section, accompanied by Mr. Ian Ross-Bell, CENSA's Secretary-General; and CENSA's Counsel, Mr. Ronald A. Capone, Washington partner in the law firm of Kirlin, Campbell and Keating.

The subject matter of these bills is of considerable interest to CENSA, which comprises the national shipowners' associations of the free world's major maritime nations other than the United States (Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Sweden and the United Kingdom) and individual liner operators/container consortia of these countries. CENSA carriers own and operate vessels accounting for 44.5 percent of the world's gross registered tonnage. They serve shippers and consignees in the foreign trade of most countries of the world, including substantial participation in the U.S. ocean commerce.

It is gratifying that liner shipping policy issues are being addressed so promptly in this Congress, with the consequent prospect that much-needed legislative reform of the 1916 Shipping Act, which received active but unfished attention during the last Congress, may finally become a reality. In this connection, the groundwork laid by the testimony and written submissions addressed to those prior statutory proposals should prove useful in connection with refinement of S. 125 and S. 1593 as well. Thus, CENSA wishes respectfully to invite attention to its submissions to the Subcommittee last year dealing with S. 1460, S. 1462, S. 1463, and H.R. 6899 of the 96th Congress, and to incorporate here by reference the relevant commentary in those submissions.

In respect to S. 125, since it is virtually identical to S. 2585 of the last Congress, we are separately submitting to the Subcommittee CENSA's comments and recommendations concerning that bill, prepared as a commentary of S. 2585 as passed by the Senate during the 96th Congress.

Turning to S. 1593, CENSA would like to put itself once again squarely on record at the outset as supporting both the desirability of and the need to a healthy U.S.-flag merchant marine. This is important not only in sustaining U.S. commercial interests that play a significant role in the vitality of free-world economies, but also in assuring logistical capabilities in support of common security interests under the Western Alliance.

In Chairman Gorton's statement to the Senate accompanying introduction of S. 1593 on August 3, he noted that revision of the regulatory policies in the 1916 Shipping Act is a necessary part of any new approach to revitalizing the U.S. maritime industry. This is both an understandable and a laudable motivation for the reforms embodied in that bill. At the same time, he acknowledged that many of these same measure can bring immediate benefits not only to U.S.-flag carriers but also to foreign flag carriers serving the U.S. foreign trade, and to U.S. exporters and importers who rely on efficient and regular services and stable rates in ocean transportation. Given such candid recognition of the eclectic and interrelated constituency involved, CENSA is encouraged to offer its equally candid observations concerning principal provisions of S. 1593 that would directly impact its membership in their participation as partners with the U.S. merchant marine in serving the needs of U.S. foreign commerce which is equally the commerce of, and of great importance to, other trading-partner countries. In this context, CENSA is particularly encouraged by the Bill's emphasis on the commerical means to obtain a competitive and efficient ocean transportation system and the absence in the objectives and provisions of the bill of any form of preferential treatment or protectionist cargo preference. Your Committee will be well aware of the harm to close a shipping trade route by intergovernmental bilateral agreements that restrict access to the trade to the national shipping companies of the trading partners, thus excluding all cross-traders. Such a negation of shippers' freedom of choice of carriers is inexcusable and CENSA reiterates its appreciation of the fact that this bill eschews any such approach.

Overall, CENSA views S. 1593 as an excellent point of departure for bringing the regulatory structure of the 1916 Shipping Act into harmony with the needs of the container age and the commercial realities of international ocean trade in our world of today. However, in so far as the bill advocates the use of closed conferences, we must record that the Union of Greek Shipowners does not accept that proposition.[1] Inevitably, in an undertaking as complex and intricate as fashioning a new U.S. liner shipping policy to serve dictates of both the present and the foreseeable future, there are provisions of the bill that may warrant clarification or revision. CENSA identifies and discusses these in the Appendix accompanying this statement.

However, the concepts of regulatory reform embodied in S. 1593 are, in CENSA's view, sound and responsive to what is required to accomplish the intended purpose. In particular, CENSA is pleased to note that the bill contains provisions that seek to update, restore and codify the following important principles:

That healthy, effective conferences are essential in the U.S. ocean trades, and that loyalty agreements reflecting commercially-determined standards, together with uniform rates, terms and conditions for through intermodal movements where agreed to among members, are necessary adjuncts [Sections 4(a) and (b), (7)];

That conferences and carriers should be permitted quickly to implement commercially-agreed arrangements to rationalize tonnage, services and sailings through pooling and other co-operative-action agreements, by imposing expedited and strict time requirements for adminstrative agency action [Sections 2(1), 6(e) and (f)];

That agreements for concerted action should be approved unless shown to be unjustly discriminatory or unfair or detrimental to commerce, with the burden of proof regarding any such consequences to be borne by the party alleging them [Section 6(b) and (c)];

That limited-membership or closed conferences are a sound commercial mechanism for achieving optimum rationalization of services [Section 4(a)(7)];

That encroachment of the antitrust laws upon activities authorized under the bill, or upon related commercial activities in other countries, is inconsistent with the jurisdictional and economic complexities of international liner shipping [Section 8(a)];

That commercial self-regulation, including commercial resolution of disputes, should be emphasized and Government regulation minimized [Sections 2(1), 5(c) and (d)(4), 6(4), 6(b) and (d), &, 17]; and

That shippers' councils have a legitimate role in consultative discussions with conferences on general rate levels, rules, practices or services in ocean cargo movements [Section 4(c)].

The foregoing principles should be most helpful in curing or reducing the problems of U.S. regulation that have beset conferences, carriers and shippers alike in the U.S. ocean trades over the past two decades, as well as the increasing frequency and intensity of international confrontations that have been precipitated during that period as a result. In many respects, the salutory objectives of S. 1593 are neither new nor startling when viewed in context; rather, they merely have the effect of restoring and refining the original intent of Congress in enacting the 1916 Shipping Act. Chairman Gorton's floor statement on August 3 makes abundantly clear that this is precisely his intention, in words that we should like to repeat here for emphasis:

> The Shipping Act of 1916 was originally designed to recognize the validity of the conference system and to insulate it from the antitrust laws of the United States. But that policy has, for all practical purposes, been stood on its head . . . . The [Supreme] Court has expanded the exposure of the liner shipping industry to charges of violating the antitrust laws. This has limited the flexibility of the conference system and, not at all incidentally, has simply outraged our international trading partners, who do not in any respect agree with either the extraterritorial application of our antitrust laws or with the theory of our antitrust laws as they relate to international commerce.
>
> The motivation for any legislation to revise the Shipping Act must focus on the intent of Congress in this area. I believe, however, that the Congress should, in undertaking this task, go much further and recodify the entire Shipping Act. We need a simplified, more efficient, responsive, and effective regulatory scheme for international liner shipping in our foreign trade. We need to reduce Government regulation where it represents a wasteful interference in commercial maritime transactions. We need to inject commercial standards and market mechanisms into every facet of our liner shipping policy to the extent that they will work as well as or better than direct regulation. And we need precisely to define this policy . . . . (Cong. Rec. Aug. 3, 1981 p. S. 9231)

Against this background, the concepts dealt with in S. 1593 form a cohesive framework for achieving the policy objectives stated in section 2 of the bill; namely,

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[1] The Union of Greek Shipowners may wish to file a supplemental statement elaborating their views.

(1) to develop and maintain an efficient ocean transportation system through commercial means, with a minimum government involvement . . . .;

(2) to foster reliable and responsible service by ocean common carriers and conferences;

(3) to assure ocean transportation rates and practices . . . which are not unjustly discriminatory;

(4) to harmonize United States shipping practices with those of its major trading partners;

(5) to permit co-operation among carriers and rationalization of services; and

(6) to facilitate efficient and timely regulation by a single Federal agency of the various aspects of international liner shipping . . . .

We have one interpretive problem with subsection (3) which is dealt with in the Appendix to this statement and although, as noted previously. CENSA has set forth in that Appendix a number of other reservations and suggestions concerning the specific language of various provisions in S. 1593 addressed to implementing the Bill's policy objectives, in the aggregate the policy objectives themselves and the concepts embodied in the substantive sections of the bill have CENSA's full support.

This is particularly true of the new standards for approvability for concerted-action agreements in Section 6(b) that no longer encompass the antitrust-laden "public interest" test, and of the antitrust exemption provided in section 8 (although as pointed out in the Appendix, CENSA is of the view that this section could and should go farther, to exclude all activities authorised or approved under the bill, and all commercial activity abroad that is involved in or related to shipping services in U.S. liner trades. As is implicit in Chairman Gorton's introductory statement the bill "overrules the Carnation and Sabre decisions and insures that violators of the Shipping Act will be subject only to civil penalties provided in the new Shipping Act itself". [Cong. Rec. Aug., 3, 1981 p. S.9232; emphasis added]). It should be emphasised that commercially based ocean conferences and carriers necessarily serve trades of direct interest to at least two, and often more, countries. They operate in and, to survive, must bridge environments that are politically, economically, legally, and socially multinational and complex. They function in environments, as do shippers and consignees, where unilateral regulation and extraterritorial application of U.S. antitrust laws create economic and jurisdictional problems, not solutions, stifling instead of stimulating better liner conference services.

This conclusion is not new. Other governments have studied liner conferences for almost 100 years. None subjects them to antitrust philosophy or regulatory statutes, concluding that maximum self-regulation by the commercial interests best serves the intercourse of nations. Your Congress also determined in 1916, after years of careful study, that the antitrust laws should not apply to shipping. In 1961, when the Bonner Bill (H.R. 6775, 87th Cong., 1st Sess.) was being considered, the House Merchant Marine Committee again pointed out that:

> [The Department of Justice] fails to take into account the peculiar nature of the peculiar business involved . . .
>
> . . . It is quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce . . . [and] any attempt to effect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American-Flag merchant marine. (See H. Rept. 96–935, at page 21).

Your Senate Committee on Commerce, Science and Transportation has also studied the problem in depth during the last several years and concluded during the last Congress, as did the Senate itself when it passed S. 2585, that the antitrust laws should be disapplied in the field of international liner shipping. As pointed out in Senate Report No. 96–656, dated April 8, 1980, accompanying S. 2585, there has in recent years been a two-pronged judicial and administrative assault on the Shipping Act's Section 15 antitrust protections which has effectively rendered them ineffective. Conferences and carriers are now exposed to two bodies of law, the Shipping Act and the antitrust laws, and to unjustifiable and protracted litigation, prosecution, and retroactive reparations and penalties stemming from court decisions in the *Carnation, Svenska* and *Sabre* cases. The Commerce Committee further observed in the cited Report that this recent assault on the antitrust protections has been responsible for such major regulatory problems as delay in the approval process for Section 15 agreements; dilution of clear standards of approvability for Section 15 agreements and unpredictability of regulatory decision-making; dumping of excess vessel tonnage in the trades between the United States and other countries; frustration of efforts by carriers co-operatively to rationalise commercial arrangements, to increase operating efficiency, to conserve vital energy resources; and disregard of the need to promote comity with your trading partners. (See S. Rept. 96–656, at pages 7–9).

Additionally, successive Chairmen of the Federal Maritime Commission have repeatedly stated in recent years that regulation of shipping within the framework of antitrust laws will not work. They are not alone. Your major trading partners, represented by our group of countries, have long held to this same view. The fact that this principle, accepted and endorsed over the years by your Congress, has been undermined by various decisions of your courts has caused severe and counter-productive conflicts of jurisdiction between your country and many other countries, including our thirteen nations, which are amply recorded in diplomatic protests. This is to be regretted at any time, but more so now when the strengthening and preservation of the Western Alliance and effective commercially-based maritime transport within it are more important than ever to all of us. The beneficiaries otherwise will be, as they have in recent times, the Soviet Bloc carriers whose objectives are not wholly commercial and who cannot realistically be regulated under the antitrust laws as such—although we applaud Section 10 of S. 1593, which deals specifically with non-commercial carriers.

Another crucial concept embodied in S. 1593 and welcomed by CENSA except for the reservation of Greece as mentioned earlier, is that conferences be able, if they so determine, to limit membership, as provided in Section 4(a)(7) and that there should be expeditious implementation of pooling and other rationalisation by conferences and carriers, as would be permitted under Section 4 in conjunction with Section 6(a)–(f). In this regard, experience has regrettably taught that at least in some major trades the open conference system presently required under the 1916 Shipping Act has generally led to overtonnaging, malpractices, waste of carrier assets and energy and higher shipping costs. To be contrasted are the systems in non-U.S. trades where conferences rationalise membership and pool their services in various forms so as to provide better services at the lowest costs. An in-depth study by the University of Wales Institute of Science and Technology ("UWIST") dated April 1978 on "Liner Shipping in the U.S. Trades" showed, for example, that rationalised carrier services in the U.S. North Atlantic/Europe trades in 1975 would have resulted in reducing vessel units from 36 to 16, improving vessel utilization from 68 percent to 85 percent, saving $200 million in costs and allowing freight rates to be reduced by at least 28 percent, and that similar conclusions were reached in a 1977 study by the Marine Transport Centre of Liverpool University.

Related to this subject, last year's House Report accompanying H.R. 6899 had this to say regarding the views of another economist:

> A paper entitled "The Economies of Ocean Liner Shipping Regulation: A Critical Review", done by Dr. John Roberts for the Department of Transportation was persuasive on this point. Dr. Roberts stated: "Indeed, there is a strong case to be made that if the choice is between a system of open cartels (conferences) or one of closed cartels, the latter may be preferable, even though structurally it departs more from the competitive idea. The reason for this is that the closed cartel may be able to achieve lower costs than would an open one, and even if these are not passed through as lower prices, less waste is still desirable. Thus, if "co-operatively organised and appropriately rationalised" through capacity controls and pooling agreements, the closed conference can be expected to achieve something like minimum costs for the level of service it provides. (H. Rept. 96-935, at page 30).

CENSA understands that this view prevailed at the Seminar in Banbury, England, last March, held by government officials, administrators and economists from the US and major European maritime nations, plus Japan.

Indeed, Professors Gunnar Sletmo and Ernest Williams in their book "Liner Conferences in the Container Age" published just this year conclude, after careful review and analysis, that the words of the Rochdale Committee are as valaid today as when they were originally drafted:

> . . . The "open" conference appears least likely to serve the interests of shippers. It is also least likely to serve that of shipowners; in their evidence to us they agreed that such a conference arrangement typically resulted in low load factors, low profits and rising freight rates. (See op. cit., p. 309).

The UWIST Study further confirms that limited membership or closed liner conferences are not and cannot be endowed with monopoly power; that self-interest, not to overlook existing and potential competition, compels conference members to charge freight rates that reflect competitive costs. The conference system, if permitted to function efficiently, makes the best use of the best resources available, and it certainly is not used as a tool to overcharge the shippers. In fact, as is well known, shipowners' returns on investment are often marginal and lower than those investing in other free-world enterprises.

A third concept dealt with in S. 1593 that CENSA warmly applauds is the express authority, coupled with antitrust immunity, for through intermodal services by conference members. Since the advent of containerisation, intermodal services have become intimately related to the activities and viability of conferences. Indeed, facilitation of rapid and economical inland delivery of ocean cargo is perhaps the most dramatic commercial consequence of containerisation. Increasingly since the late 1960's, conference carriers have invested billions of dollars in building container, Ro-Ro and LASH/Sea Bee vessels, and related intermodal equipment and systems. To realise the full potential of intermodalism, it is essential that conferences be able to offer uniform rates, terms and conditions for through movement of ocean cargo; that is, providing shippers with access to transportation of their cargo from inland point of origin to inland point of destination via any member carrier at the same rates and under the same terms and conditions of carriage. Only in this way can the ultimate economies of scale and efficiencies of handling inherent in containerisation of ocean freight be achieved by a conference; without through intermodal authority, conferences would be precluded from offering shippers generally the best possible service on equal terms at the lowest practicable cost.

Litigation presently pending before the United States Court of Appeals for the District of Columbia Circuit[2] squarely presents the Department of Justice position that under the Shipping Act as now in force, conference activity can extend only to port-to-port movements and therefore the FMC has no authority to approve conference agreements to regulate the intermodal services of their members. Should this view prevail, unrectified as proposed in Section 4(b) of S. 1593, the restriction would ultimately lead to the undermining of conference tariffs, rate-cutting, rate wars, and resulting carrier bankruptcies, monopolies, destruction of conferences, and other evils of predatory competition that your Congress and other governments have sought to avoid over the decades. Apart from these economic consequences, and bearing in mind that a particular service involves carriers of a number of countries which support conference intermodal service, the position taken by the Department of Justice can only needlessly cause significant international jurisdictional confrontations and problems. Thus, express legislative authority for through intermodal service by ocean conferences is essential.

Finally, CENSA would like to address a concept on which Chairman Gorton invited comments, but which is, happily, absent from S. 1593—the mandatory right of a conference member to exercise independent rate action. The right of independent action as between members of a conference attacks the very foundation of the conference system, which is to provide all shippers with stable freight rates and services. Independent rate action is a totally destructive weapon, in that it would undermine healthy effective conferences and destabilize rate and service structures. There is ample evidence of this, as witness the chaotic conditions that developed last year in the U.S. North Atlantic and Pacific trades when independent rate action was forced upon conferences by one member carrier. In practical terms, once independent rate action has been conceded in a conference the individual members would make as many private deals as they could with powerful shippers at whatever rates they can get, and other conference members would then be forced to follow suit in order to protect their carryings. Consequently, there would be a continual downwards spiral in rates, with consequent discrimination amongst shippers and bankruptcy among the weaker carriers. Such an outcome is in the interest neither of carriers nor shippers.

There is no merit to the contention of the few who argue that mandatory independent action is necessary because some conferences are allegedly non-responsive in meeting the competition of the Soviet Bloc and other non-conference carriers. If a particular conference member holds that view strongly and cannot convince his colleagues, then he always has the option to withdraw from the conference and compete as an outsider. It would be wrong for legislation to enable him t6 overcome the opposition of the majority. Conferences anyway do not and cannot ignore outside competition. Moreover, independently reduced rates are not a deterrent to noncommercial carriers whose survival does not turn upon reporting profits and losses to private investors; whose pursuits are strategic, not commercial. Independent action plays into the hands of the latter, who benefit whenever a commerical Western World carrier is forced out of a trade or out of business. Although Soviet liner carriers are not presently a factor to be reckoned with in U.S. ocean commerce, they have an established record of exploiting unstable trading conditions and one can predict with virtual certainty that, if such conditions should develop as a regular commercial pattern in the U.S. liner trades, the Soviets would quickly be back on the scene with a vengeance.

We could go on at length about other concepts embodied in S. 1593 and the issues to which they are addressed—including, for example, the importance of expeditiously rationalizing tonnage and services because of tremendous capital investments and bunker costs; the difficult financial position of many carriers operating in the U.S. liner trades; the time-consuming, expensive, unpredictable, and dilatory tactics and uncertainties presently attending processing of Section 15 agreements and administration of other provisions of the Shipping Act; the importance of relying on commercial interests and standards rather than Government fiat, and so forth. However, suffice it at this point to reiterate CENSA's support for the basic policy standards set forth in section 2 of the bill, except for the interpretive problems mentioned above concerning subsection (3), for the implementing conceptual structure reflected in succeeding substantive sections and, subject to the reservations and suggestions dealt with in the Appendix to this statement, for the bill itself.

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[2] *United States* v. *FMC*, D.C. cir., no. 79-1299—pending rehearing en banc.

As Chairman Gorton emphasised in his remarks accompanying introduction of S.1593 on August 3, the bill is intended as a serious vehicle for discussion. In that vein, CENSA's comments are intended to be a constructive and supportive of the objectives you have set out to accomplish. We trust our views will be helpful in this connection and that the Subcommittee's mission will meet with the degree of success that this thoughtful beginning warrants.

APPENDIX

In order to achieve the most commendable principal objectives of S.1593, CESNA submits, and urges the Senate Subcommittee and the Committee on Commerce, Science and Transportation to adopt the following proposed changes in the text of the bill.

Because of its major importance, the provisions disapplying the antitrust laws are taken up first; thereafter, the other provisions that are still of concern. Where the text is set out, new language is italic and deletion are in black brackets; continuation of the text of the bill is indicated by asterisks.

Section 8. Exemption from Antitrust Laws

Section 8(a). CENSA strongly urges that paragraph (8)(1)-(5) be deleted and the text of subsection (a) be revised to read as follows:

> "(a) the requirement, standards, penalties and civil liabilities provided in this Act shall, as to the activities regulated herein of all common carriers by water, conferences, shippers' councils and other persons subject to this Act, be exclusive of all other laws, including specifically the antitrust laws; neither shall the antitrust laws apply (i) to any agreement that concerns or involves joint or through intermodal transportation, or other transportation and related services between or within any foreign country or place, or (ii) to consultations with or activities of shippers' councils situated outside the United States."

Comments.—This provision would be more consistent with the stated intention of the antitrust exemption sought to be provided. In the remarks introducing S. 1593, Chairman Gorton correctly noted the grave and unjustifiable problems that in recent years have beset the international liner carriers and have outraged the international trading partners of the United States attending application of the antitrust laws and standards to ocean liner activities described in the Shipping Act, 1916 as amended. He further stated that the bill would and should restore historical Congressional intent; that it overrules the *Carnation* and *Sabre* decisions, insures that violators of the Shipping Act will be "subject only to civil penalties provided in" the bill, and "strips away the most rigorous layer of regulation—the antitrust laws," also disapplying the latter to conference intermodal activities. CENSA wholeheartedly agrees with this general objective and believes much of it would be accomplished by the provisions in Section 8 of the bill, if amended as we have proposed above.

As drafted, section 8(a)(1) and (2) limit antitrust immunity to agreements of activity described in Sections 4 and 7 of the bill. It is silent as to the Prohibited Acts enumerated in Section 12. It could, in result, be argued that Section 12 activities are not immunized. Indeed, this is precisely what happened in the *Sabre* cases, where the court held that rates violative of Section 18(b)(5) *i.e.,* so unreasonably low as to be detrimental to commerce (identical to Section 12(a)(4) of the bill)—were beyond the scope of an approved agreement, thus subject—retroactively—to an antitrust treble damage action.

It needs no elaboration to appreciate the difficulties in precisely determining in advance when a rate is so unreasonably high or low as to be detrimental, rates that are unduly prejudical to exporters, rates that are unjustly discriminatory, and other activities prohibited by Section 12. Long after an initial and well-intentioned action, conferences and carriers could be again confronted witha Sabre-type decision. And in the words of Chairman Gorton in his introductory remarks, the antitrust laws have had a "chilling effect" on international shipping practice; "application of the antitrust laws has brought uncertainty to many operator decisions"; and "the margin of [the present limited antitrust] exemption are unclear".

The word "solely" is Section 8(a)(3) could be construed, for example, as excluding from the intended antitrust law exemption arrangements by conferences or ocean carriers for inland *foreign* motor, rail or air transportation in connection with intermodal routes and services. Also to be kept in mind is the fact that other countries take strong issue with the application of the antitrust laws as well as the Shipping Act to transportation arrangements and activities performed within their jurisdictions. Our suggested amendment to Section 8(a) would implement the policy objective of harmonizing U.S. practices with those of its trading partners and would reduce jurisdictional friction and confrontations.

Surely, applications of the antitrust laws to consolidating and forwarding arrangements and services in other countries as envisaged in the present wording of Section 8(a)(5) would wrongfully invade the jurisdictions of trading partner sovereigns. The wisdom of avoiding such extraterritorial reach is reflected in the existing definition of forwarding in Section 1 of the Shipping Act, *i.e.*, "the dispatching of shipments . . . in the commerce *from* the United States . . . . "

Section 8(b). Delete this provision.

Comments.—It is inconsistent with Section 4(b) and Section 5(c)(4) as to intermodal agreements with any air, motor, rail and water carriers, or any combination thereof, operating within the U.S. The antitrust laws are disapplied under Section 8(a)(3), and properly so, in respect to agreements and activities involving services of such carriers in foreign countries.

Section 2. Declaration of Policy

Section 2(3). Delete this provision and substitute the following:

> *"(3) to protect the rights of carriers, shippers and ports against unjustly discriminatory or prejudicial rates, and unfair or deceptive practices."*

Comment.—The word "assure" in Section 2(3) could be construed to authorise rate-fixing by the Commission, authority which Congress has wisely and on more than one occasion withheld, bearing in mind that the United States trades are equally those of its trading partners and the conflicts and regulatory chaos if countries at each end of a movement attempt to set rates, not to overlook what experience has demonstrated concerning the time-consuming, expensive and, in the end, the unproductive results attending rate-fixing. Furtherrmore, "internationally competitive rates and practices" is an amorphous, boundless standard, opening the door to countless economic and other factors affecting exporters and importers and the inevitable need, as a result, for extensive, time-consuming and expensive hearings to establish meaningful content where that abstract principle is drawn into issue in specific application of particular substantive provisions of the bill.

CENSA respectfully suggests that Section 12(a)(8) and (11) offer ample safeguards. Ultimately, the best and realistic safeguards are in the marketplace, *i.e.*, the compelling need of carriers to maximise their carryings and earnings, thus to accommodate their shipper patrons to the extent possible, and the right of their shippers to complain if shipping costs are unduly prejudicial or discriminatory.

Section 3. Definitions

Section 3(3). Revise subsection A to read:

> "(A) cargo that is loaded and carried without mark or count, *except liquid bulk cargo carried in parcel lots*".

Comments.—The two definitions presently included under subsection (3) relate to the further provisions in section 7(a)(10) excluding bulk cargo from coverage under loyalty contracts and the tariff requirements of section 9(a). However, it should be noted that chemical, alcoholic and other liquid bulk cargoes are frequently shipped in tanks, drums or other packaging units carried by liner vessels. That fact should be reflected as an exclusion of such commodities from the text of present paragraph (A).

The "neo-bulk" cargoes described in present paragraph (B) are by no means exclusively dedicated to container movement—the springboard for the definition; they are frequently carried in, and can be significant movements for breakbulk, LASH and Roll-On Roll-Off vessels as well. CENSA has mixed feelings about subjecting these cargoes to the tariff filing requirement, but is of the clear view that their inclusion or exclusion from loyalty contracts should be commercially determined by conferences and vessel operating common carriers.

Section 3(5). Revise to read:

> "(5) 'common carrier' means a person, whether or not actually operating a vessel, who holds himself out to engage in *and undertakes* transportation by water, *including intermodal transportation,* for hire *on regular routes* as a public employment [and undertakes to carry for shippers indifferently.]"

Comments.—CENSA continues its serious misgivings about perpetuating the legal fiction of an NVOCC, created by the FMC's predecessors in order to gain regulatory jurisdiction over this hybrid variety of shipper, although we noted the definition of "ocean common carrier" in section 3(12) and the manner in which that term is applied in later sections of the bill, as to which we comment below. In any event, the suggested additional words and phrases will conform the definition to the intent of the bill and to existing statutes and decisional law.

The words "and undertakes to carry for shippers indifferently" should be deleted. They could be misconstrued, considering that vessel operating common carriers should and do have the right to exclude certain types of cargo that are, for example, hazardous or noxious, or because of a vessel's characteristics.

Incidentally, it is also suggested that the Subcommittee consider the desirability of geographically defining the word "transportation". The term is used in section 3(5) and other provisions of the bill, but is defined only in the text of section 3(12) in respect of "ocean common carriers".

Section 3(8). The word "ocean" before the words "common carrier" should be deleted.

Comment.—As this provision now reads, a deferred rebate is limited definitionally to a transaction engaged in by an "ocean common carrier", *i.e.*, a *vessel operating* common carrier, as defined in section 3(12). No good reason is perceived for excluding like transactions by NVOCCs if existence of the latter is continued.

Section 3(11). Revise to read:

> "(11) 'non-vessel-operating common carrier' means a *person in the United States that operates as a* common carrier [by water] *and* that does not operate the vessels by which the ocean transportation service is provided. A non-vessel-operating common carrier is a shipper in his relationship with ocean common carriers;"

Comment.—The suggested additional wording is intended to make clear that there is no intention to seek regulatory jurisdiction over foreign-situated NVOCCs. The definition otherwise assumes adoption of the revised definition of "common carrier" in section 3(5), above.

Section 3(13). Revise as follows:

> "(13) 'other person subject to this Act' means any person *in the United States* engaged in the business of consolidating, freight forwarding, or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with an ocean common carrier;"

Comment.—The additional wording is to avoid extension of jurisdiction over the described activities in other countries and, serious jurisdictional matters aside, the obvious fact that any effort to regulate the activities in other countries of the described "other persons" would be an exercise in futility. Further, it is assumed that the word "consolidating" is not synonymous with the term NVOCCs; if there is doubt (and the very fact that the question arises suggests that there is), the distinction between the two should be made clear.

Section 3(14). Delete the proposed definition and restore the definitions of 'carrying on the business of forwarding' and 'independent freight forwarder' that were in Section 1 of the Shipping Act, 1916, prior to enactment last July of Section 1608 of the Omnibus Budget Reconciliation Act of 1981.

Comment.—For convenience, comments concerning the proposed definition are integrated in the comments, below, on the proposed requirements of Section 11 in respect of ocean forwarders.

Section 3(21). Change the text to read:

> "(21) 'through intemodal rate' means the [single] amount *or amounts* charged by an ocean common carrier in connection with through transportation;"

Comment.—Ocean common carriers or conferences offering through intermodal service should not be precluded from quoting combination rates as well as joint single-factor rates if circumstances warrant in a given case, Restricting the rate to a "single amount" is confusing at best and is otherwise unnecessarily restrictive.

Section 4. Authorised Activities

Section 4(a). Revise the heading and preamble to read:

> "(a) *Ocean Common Carrier and* Conference Activities. Ocean common carriers [or other persons] subject to this Act may agree to—"

Comment.—The heading should include ocean common carriers to reflect the fact that non-conference vessel operators can engage in the described activities, as they have in the past. There is no perceivable basis for permitting "other persons subject to this Act" to engage in the activities described in subsection (a)—or, for that matter, the intermodal activities described in subsection (b).

Section 4(a)(6). Revise to read:

> "(6) enter into other agreements to control, regulate, or prevent competition [among themselves] and"

Comment.—The restrictive words "among themselves" alone, and especially when coupled with the prohibited activities in section 12(a)(9) as to which we comment later, are most undesirable and could serve to emasculate or destroy the healthy, efficient conferences envisioned by previous Congresses and the sponsors of S. 1593. The destructive consequences are obvious considering, for example, that conferences and carriers justifiably must and do set rates and utilise loyalty contracts in order to retain or obtain cargoes that would otherwise be transported by existing or potential non-conference carriers.

This precise issue, then in the context of very similar restrictive provisions in the House draft of the Bonner bill, HR 6775, relating to dual rate contracts, was thoroughly considered and wisely *rejected* by the Senate Commerce Committee, by the Senate itself and later by the House. CENSA cannot overstress the destructive consequences of the restrictive wording in sections 4(a)(6) and 12(a)(9). We urge the Subcommittee to review the testimony summarized and conclusions reached by the Senate Commerce Committee in Report No. 860, dated August 31, 1961, 87th Cong., 1st Sess., accompanying HR 6775, at pages 20-23. (That report also appears in Index to Legislative History of the Steamship Conference Dual Rate Law, P.L. 87-346, dated May 17, 1962 at pages 219-222.)

Section 4(b) Revise to read:

"(b) INTERMODAL ACTIVITIES.—Ocean common carriers or other persons subject to this Act may agree with each other or with any *or any* combination of * * *

Comment.—None of the defined "other persons" offer, or should be permitted to engage in operating through intermodal transportation service. The additional words "or any" are to make certain that the ocean carriers can enter into intermodal arrangements with individual air, rail or motor carriers.

Section 5. Agreements

Section 5(b). Insert additional wording as follows:

"(b) FILING REQUIREMENTS.—A true copy of every agreement entered into with respect to any activity described in section 4 shall be filed with the Commission, *except agreements for transportation to be performed outside the United States.* In the case of oral agreements, complete memoranda specifying in detail the substance of such agreements shall be filed. Within 10 working days of receipt, the Commission shall transmit a notice of filing to the Federal Register for publication."

Comments.—The additional language is consistent with previous observations on the importance of refraining from regulating activities within the jurisdiction of other sovereign States. Moreover, motor and rail carriers in other countries are not regulated as, until most recently, they have been in the United States. Ocean carrier agreements with foreign inland carriers can and often must be changed quickly; and subjecting the myriad of such agreements and amendments to the prescribed filing and approval requirements would be unrealistic and destructive of the policy objective in section 2(1); *e.g.*, "to develop and maintain an efficient ocean transportation system, through commercial means, with minimum government involvement."

Section 5(c)(3). Revise to provide:

> "(3) engage the services of an independent neutral body to police fully the obligations of the conference and its members, *provided that in respect to particular conferences, the Commission may dispense with this requirement for good cause shown;"*

Comment.—Employment of neutral bodies can impose an unjustified cost upon carriers and ultimately the shippers in some trades. An inflexible requirement should be avoided. Not incidentally, CENSA fails to see the justification for not extending this requirement to NVOCCs and non-conference carriers operating in trades that have had a history of malpractices if it is to be applied to conferences. CENSA further believes, however, that employment of neutral bodies should be left to the decision of conferences and carriers.

Section 5(c)(4)(A). Further consideration of this requirement is urged in the light of the following comments:

Comments.—This Section requires independent action between carriers not members of the same conference, and between conferences serving different trades that would otherwise be naturally competitive. Presumably independent action refers to rates, but the word "action" is not defined. Additionally, the phrase "in any agreement between carriers not members of the same conference" is not clear and presents problems. For example, in the context of the Section 5(a) preamble this subsection would require that "every conference must . . . provide the right of independent action—(A) in any agreement between carriers not members of the same conference." However, conferences are not parties to, and thus can not themselves insert such a requirement in agreements between the described carriers. In this regard, one should bear in mind that a number of conferences compete for cargo originating in or destined to common hinterlands, and sometimes from or to coastal ports (in adjacent countries for instance), and that present conference areas in United States trades are too small to meet intermodal transport requirements.

Section 5(c)(5). Revise to provide:

"(5) provide for **[**a consultation process designed to insure**]**"

Comments.—The objectives in paragraphs (A) through (D) of subsection (5) are unobjectionable. Commercial resolution of disputes is particularly to be desired. The deletions are suggested so as not to confine the enumerated objectives to a "consultation process." Also, while consultation presumably is to be with shippers' councils, the present text is ambiguous concerning the persons or entities with whom conferences must consult, commercially resolve disputes, etc.

Section 6. Action on Areements

Section 6(a). Insert additional language as follows:

"(a) Rejection by the Commission.—Any agreement that does not conform to the requirements of section 5 shall be rejected by the Commission—, *after notice to the proponents and an opportunity for hearing if requested,"*

Comment.—The purpose of the suggested additional language is obvious and consistent with fair regulatory procedure.

Section 6. Action on Agreements

"The burden of proof in any proceeding under this section should be on the **[**party opposing the agreement**]** *or on the person or entity alleging or seeking to establish that the agreement should be rejected, disapproved or modified."*

Comment.—The revision would more clearly implement the basic concept of subsection 6(c) in relation to subsections 6 (a) and (b) and CENSA's proposed revision of 6(e), below.

Section 6(e). Revise the heading, insert "(2)" before the text of the present paragraph, and add a new paragraph as follows:

"(e) Temporary and Final Decision Time.—(1) *Within 45 days after Federal Register notice of filing of any agreement pursuant to section 4, the Commission shall grant temporary approval pending the Commission's final disposition of the agreement under this Act, unless, within such 45-day period, upon the verified complaint of a carrier, shipper, port or other person served within 20 days of publication in the Federal Register of notice of such filing, the Commission finds that:*

"(i) the parties to the agreement would not be substantially harmed if the agreement were not immediately approved and implemented; and"

(ii) the complainant would be irreparably harmed if temporary approval were granted; and"

"(iii) it appears from all the information available to the Commission that the agreement is likely to be found in violation of this Act."

"*(2)* The Commission shall issue a final decision on any agreement within 180 days after filing with the Commission. For good cause the Commission may extend the time period once for not more than 90 days."

Comments.—This approach is consistent with the policies and standards of the bill; *i.e.,* expeditious regulation, reliance upon commercial interests, *etc.* The 180 day, and potentially 9 month, period for action on agreements is long and could frustrate implementation of agreements beneficial to carriers, shippers and commerce. Hence, a temporary approval procedure is important. If commercial interests do not file legitimate complaints, the probability is that the agreement will not offend the policies and standards of the Act. Moreover, even if a complaint is filed, 45 days should be ample time for the Commission to evaluate the complaints and replies thereto, and to determine whether the statutory grounds exist for withholding temporary approval.

Section 9. Tariffs

Section 9(a). Revise line 6 to read:

"(a) In General.—(1) Except with regard to bulk cargo, every ocean common carrier shall file * * *.

Comment.—"Ocean common carrier" is defined in section 2(12) of the bill as the vessel-operating carrier. Nevertheless, the definition of "common carrier" in section 2(5) of the bill includes NVOCCs. If continued existence of this latter entity is to be permitted, CENSA fails to perceive any justification for not requiring the NVOCC to file tariffs and abide by other requirements imposed upon vessel-operating common carriers.

Section 9(b).—Revise the last sentence to read:

"(b) Initial Rates and Rate Changes.—No initial rates or increases in existing rates shall become effective * * *. The Commission, for good cause, may allow rate increases, *other than surcharges,* **[**or surcharges**]** to become effective in less than 30 days. *Surcharges may become effective not earlier than 14 days after publication and filing with the Commission."*

Comments.—As correctly reflected in the definition, carriers are on occasion confronted with extraordinary or "sudden" changes in costs or revenues. The extent of fluctuations in currency exchange rates, as an illustration, has been and can be unpredictable on any given day. They are unforeseen events which cannot be calculated in advance and the losses they cause should be recoverable with a minimum of delay. This is surely an area where reliance should be placed upon the commercial good sense of the carriers who have not and do not lightly increase their shipper's costs. The good cause procedure in respect to surcharges is uncertain of results, procedurally cumbersome and time-consuming, and is incompatible with the policy objective of minimizing government regulation and relying as much as possible on commercial judgements.

Section 11. Ocean Freight Forwarders and Non-vessel Operating Common Carriers

Section 11(c). Revise to reflect the following concerns and suggestions:

Comment.—Most recently, this past July, some of the longstanding forwarder provisions in the Shipping Act were unexpectedly revised by Section 1608 of the Omnibus Budget Reconciliation Act of 1981 so as (a) to eliminate the requirement that ocean forwarders in the United States export trades should not have a beneficial interest in the shipments, nor directly or indirectly control or be controlled by shippers, consignees or others having a beneficial interest in the shipments, and (b) correspondingly to permit until at least the end of 1983 forwarder compensation by carriers except in regard to shipments in which the forwarder, its holding company, subsidiary, or affiliate, etc., has a beneficial interest. In short, shippers, consignees, sellers or purchasers of shipments can now establish forwarding companies.

Sections (d)(14) and (11) of the bill go further. They would, in part, totally eliminate in the foreign trades the pre-budget act requirements that ocean forwarders be truly "independent" and that they must be fit, willing and able to serve as forwarders and thus must hold a license issued by the Federal Martime Commission.

In assessing the wisdom of the Budget Act revisions and those proposed in the Bill, it will be recalled that the requirements in respect to the independence of the forwarders and their fitness, ability and licensing have been in force since 1961. They were enacted after several years of most careful consideration by your predecessor committee and the House Merchant Marine and Fisheries Committee, preceded by extensive investigation at the Federal Maritime Commission, in order to foster a healthy forwarding industry, to curb rampant malpractices, and to benefit commerce. See, e.g. S. Rept. No. 691, accompanying S. 1368, 87th Cong., 1st Sess., Aug. 9, 1961. In addition to the serious question whether these objectives should be abandoned, the proposed changes present serious practical problems for the carriers.

For example, most carriers now pay forwarders automatically as a by-product of processing thousands of bills of lading through their computer facilities, quickly checking whether the forwarder holds a license and has executed a proper certification satisfying the statutorily required services. The license gives a measure of assurance not only concerning the bond requirement, but also that the forwarder has the character and expertise competently to handle shipments; assurances that would disappear under the proposed change since there is simply no way that carriers can check on the integrity and ability of the forwarders who will spring up during the daily processing of thousands of bills of lading.

Furthermore, removal of the historical "independent" forwarder standard coupled with the related prohibition in section 11(c)(4) against compensating a forwarder where the forwarder or a related shipper has a beneficial interest in the shipment would compound the difficulties. There is no realistic basis for expecting carriers to determine the existence or non-existence of a beneficial interest relationship considering the magnitude of shipments that must be handled daily and that anyone could under the proposal become a forwarder on posting a bond with the Commission; and it would be patently inequitable to expose the carriers to the civil penalties under section 15(a) of the Bill if payments violating section 11(c)(4) should be made. The policing difficulties would also be compounded by the fact that forwarders might operate under two sets of statutory requirements and standards: in the foreign trades under the changes in the Bill; and in your domestic trades under the historical Shipping Act requirements.

In sum, one can anticipate that the proposed changes and discarding of the requirements that have existed for twenty years will result in a progressive increase in malpractices which will be difficult, if not impossible, for the individual carriers or others to control, and to the undermining of the ocean forwarder industry to the serious detriment of the ocean carriers and commerce.

Additionally, there is concern about Section 11(c)(3). Ocean carriers employ agents in one port or another to handle a number of matters. They are not necessarily freight forwarders as such; but in some instances, they do perform one or more of the services described in section 11(c)(1). Duplicate payments for the same services is one thing; however, a flat prohibition against paying the carrier's agents or any other ocean common carrier or its agent's for the described services seems plainly wrong and could deprive the ocean carriers of essential services. And on an incidental note, one fails to perceive why section 11(c) requirements should apply only to "ocean" carriers and not also to NVOCCs, which would be the consequence unless the word "ocean" were not deleted in the text.

In conclusion, while CENSA has no objection to the bonding requirements in section 11(a) of the bill, it urges reinstatement of the definitions in section 1 and the provisions in section 44 of the Shipping Act that were in effect prior to the Omnibus Budget Reconcilation Act of 1981.

Section 12. Prohibited Acts

Section 12(a). Revise heading and preamble paragraph to read:

"(a) By [Ocean] Common Carriers.—No [ocean] common carrier may—

Comments.—Definitionally, the term "ocean common carrier" does not include NVOCCs. If the latter are to be permitted to continue as "common carriers," at least some of the activities prohibited by section 12 should also apply to them, such as giving rebates, refunds, *etc.*

Section 12(a)(5). Delete.

Comment.—CENSA appreciates that this section is taken from the existing Act. However, a provision prohibiting undue prejudice in export rates, such as section 12(a)(5), only serves to foster unnecessary, expensive, unproductive regulation, litigation, and undesirable potential rate-fixing by the Commission, not to overlook international jurisdictional problems. It takes little imagination to appreciate that there can be, and are, a multitude of transportation factors that affect the rates on similar (including the question whether they are truly similar) commodities moving to the same market from different countries, e.g., different carriers (conference and non-conference), carrier costs, port costs, stevedoring costs, cargo volume generally and for specific commodities, return voyage traffic, distances and exchange rates, to mention a few. Conference and carriers in the US trades should not, and cannot productively, be burdened with the monumental task, which would be a daily one, of attempting to ascertain the commodities moving in non-US trades, whether they compete with US origin commodities, and the applicable non-US trade ocean rates. If export rates are unduly prejudicial and harmful, one can count upon the exporters to request relief from conference and non-conference carriers, and the granting of relief to the extent possible, relying on subsection 12(a)(8) and (11) which afford all shippers, including US exporters, protection against unfair treatment or unjust discrimination.

Section 12(a)(9). Revise to restore existing statutory text, as follows:

> "(9) use any fighting ship [or engage in any practices designed to reduce or eliminate the participation of non-conference carriers] *in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade;"*

Comment.—The revised text tracks the language in section 14 Second of the Shipping Act, 1916. CENSA cannot overstress the destructive consequences that would attend a prohibition against conference "practices" where the conference members justifiably attempt to regain, obtain, or prevent the loss of cargo in order to protect their capital investments (currently running into hundreds of millions of dollars), replace their obsolete vessels and related equipment and systems (at increasing costs each year), and continue to offer reliable modern ocean-based transportation systems to the shipping public. See again on this issue the 1961 Senate Commerce Committee views cited in our comments, above, in regard to Section 4(a)(6) of the bill.

It may be of interest to the Subcommittee to note that CENSA's apprehension on this point and the conclusions reached in 1961 by the Senate Commerce Committee, have had world-wide support. The UNCTAD Code precludes the use of fighting ships in terms paralleling existing section 14 Second of the Shipping Act, 1916. At the final 1974 session of the Conference of Plenipotentiaries on the Code in Geneva, the plenipotentiary from India, speaking for the Group of 77 (actually then representing many more than 77 countries), stated:

"The Group of 77 had agreed to the provisions in the Code regarding fighting ships and have supported the above-mentioned resolution on the clear understanding the non-conference shipping lines will not be permitted to operate in a manner which damages the smooth functioning and operation of liner conferences.***" UNCTAD, Report of the Conference on the Second Part of Its Session, UNCTAD Doc. TD/CODE-10/Vol. 1, at 122–23 (1974).

Section 12(c). Revise the heading and preamble to read:

"(c) BY *Common Carriers and* OTHER PERSONS.—It shall be unlawful for any ocean common carrier, or shipper, *or, in respect to subparagraph 2, below, for any non-vessel operating common carrier* or other person subject to this Act—

Comments.—The heading should be corrected if ocean common carriers and, in CENSA's view, NVOCCs are included. Also, the bill does not give NVOCCs the right to enter into Section 4 agreements and, if CENSA's suggestd changes are made in Sections 4(a) and 4(b), "other persons subject to the Act" would likewise be precluded. However, NVOCCs and "other persons" properly should be subject to the subparagraph 2 requirements. Hence, the additional suggested language.

Section 13. Complaints, Investigations and Reparations

Insert new subsection 13(d) and correspondingly redesignate subsections (d) and (e) as (e) and (f), respectively, the new subsection (d) to read:

"*(d)* BURDEN OF PROOF.—*In any proceeding under this section the burden of proof shall be upon the person or entity alleging the violation.*"

Comment.—This additional provision reflects desirable and recognised evidentiary principles in respect to violation proceedings as well as the basic principle reflected in subsection 6(c) of the Bill.

Section 13[(e)] *(f)*. Insert additional language as follows:

"[(e)] *(f)* REPARATIONS.—After notice and hearing of any complaint filed pursuant to subsection (a) of this section within one year *after the cause of action accrued*, the Commission may when appropriate * * *"

Comment. The one-year limitation obviously requires a starting time.

Section 14. Subpenas and Discovery

Comment.—Your Committee will no doubt wish to consider the implications of this section and the importance of adhering to the principles of international law and comity, that one sovereign State should refrain from extending judicial or quasi-judicial process to persons and to obtain documents situated within the jurisdiction of another sovereign State without the latter's consent. These jurisdictional rights, limitations and problems are, to a degree, recognised in section 14(c) and (e) of the bill. Recently-enacted laws of other trading partner sovereigns clearly reflect their views on the subject of protecting persons and commercial information within their jurisdiction. In the meantime, subsections (a)(1) and (2) should be amended to refer only to the subpena of material with the territorial jurisdiction of the USA; and thereby avoid preempting international discussions and agreement on this vexing and important matter.

Section 14(c). Delete the word "ocean" in the first sentence of this subsection, *i.e.:*

"(c) SUSPENSION OF TARIFFS.—After notice and opportunity for hearing, the Commission may suspend any or all tariffs of any [ocean] common carrier, or the right. . . ."

Comment.—CENSA remains of the belief that suspension of tariffs is a draconic measure that should not be adopted in respect of OECD members especially, particularly considering that it is not endorsed by other sovereign trading partners having equal rights and interests in the trade, in continuation of carriers service, and in the welfare of its carrier citizens operating in the particular trade. This aside, the deletion of the word "ocean" is to make clear that the provision should, if enacted, apply also to NVOCCs who, if their existence continues to be authorised, would also have to file tariffs.

NOTE: The word "ocean" should, for similar reason, be deleted in sections 14 (d) and (e) and 15 (a) and (b).

Section 14 (c) [continued], *(d) and (e).* Further revise subsection (c), redesignate present subsection (d) as subsection (f) and transfer to proper sequence, redesignate present subsection (e) as subsection (d) and add a new subsection (e), as follows:

"(c) SUSPENSION OF TARIFFS.—After notice and opportunity for hearing, the Commission may suspend any or all tariffs of any common carrier, or the right of a conference member to utilise conference tariffs, if the carrier or conference fails to supply information authorised to be obtained under subsection (a)-: [Any suspension ordered pursuant to this subsection shall be immediately submitted to the President who may disapprove it if he finds such disapproval is required for national defence or foreign policy reasons.] *Provided, That if the common carrier or conference has raised the allegation referred to in subsection (d) of this section in defence of its failure to supply such information, the effective date of the Commission's suspension order shall be stayed pending satisfaction of the requirements in subsections (d) and (e) hereunder; and Provided Further, That in the absence of any such allegation, the Commission's suspension order shall nevertheless be stayed pending satisfaction of the requirements in subsection (e) hereunder.*

"(d) ASSISTANCE OF SECRETARY OF STATE IN OBTAINING INFORMATION.—If, in defense of its failure to comply with a subpena or discovery order issued under this section, [an ocean] *a* common carrier *or conference* alleges that documents or information located in a foreign country cannot be produced because of the laws of that country, the Commission shall immediately notify the Secretary of State of such failure to comply and of the allegation relating to foreign laws. Upon receiving such notification, the Secretary of State shall promptly consult with the government of the nation within which the documents or information are alleged to be located for the purpose of assisting the Commission in obtaining the documents or information sought. *The Secretary of State shall notify the President and the Commission as soon as possible whether and the extent to which the documents or information will be produced; and the Commission immediately thereafter shall notify all interested parties of the consultation results.*

"*(e) Presidential Action.—Upon issuing a proposed suspension order under subsection (c) of this section, the Commission shall immediately submit it to the President for review. (1) In a case where subsection (d) of this section is inapplicable, the President may within 20 days after receipt of the proposed suspension order from the Commission, disapprove such order if he finds such disapproval is required for national defence or foreign policy reasons. (2) In a case where subsection (d) of this section is applicable, the President may, within 20 days after receipt of the notification from the Secretary of State as provided therein, either (i) disapprove the Commission's suspension order if he finds such disapproval is required for national defence or foreign policy reasons or (ii) conditionally disapprove the Commission's suspension order for a specified period if he finds that substantial compliance with the Commission's subpena or discovery demands can reasonably be expected within a reasonable time and that such conditional disapproval of the Commission's proposed suspension order is warranted on national defence or foreign policy grounds. (3) Notice of disapproval or conditional disapproval of the Commission's proposed suspension order, as provided in paragraph (2)(i) or (ii) of this subsection, shall be transmitted promptly to the Commission, and by the latter immediately thereafter to all interested parties.*"

Comments.—CENSA re-emphasizes its most grave concerns about the suspension provisions of the bill. Without conceding they are wise or necessary, the suggested revisions are intended to arrange the subsections in logical sequence and revise them in order to provide for more definite procedures and participation by the Secretary of State and your President before the suspension order becomes effective.

Section 14(d) [continued]. After redesignation as subsection "(f)", revise to read:

"**[**(d)**]** *(f)* Civil Penalty.—Any **[**ocean**]** common carrier who *wilfully and knowingly* accepts or handles cargo for carriage under tariffs which have been suspended pursuant to this section shall be subject to a civil penalty of not more than **[**$50,000**]** *$25,000* for each shipment."

Comment.—Again, without receding from CENSA's previously expressed concerns on suspension of tariffs, the maximum penalty amount is unduly severe (compare the $25,000 maximum amount in Section 15 of the bill) and exposure to the penalty in any amount should not be triggered unless the carrier wilfully and knowingly accepts or handles cargo for carriage under suspended tariffs. See also CENSA's recommended expansion of the Commission's authority in Section 15 of the bill to compromise, modify, or remit penalties.

Section 15. Penalties

Section 15(e). Revise and reposition this provision.

Comment.—Under this provision, the Commission's authority to compromise, modify, or remit civil penalties extends only to penalties assessed under Section 15 of the bill. It is recommended that this authority be extended to civil penalties specified under any provision of the bill, including the tariff suspension penalties in section 14(d). If this is done, the authority in question should be the subject of a separate section of the bill; probably numbered 17, with present sections 17, 18 and 19 renumbered accordingly.

[The following information was subsequently received for the record:]

Questions of Senator Gorton and the Answers Thereto

Question 1. How important are loyalty contracts to an effective conference?

Answer. Effective, with the emphasis on "effective" loyalty contracts are important as they help to achieve stability and assist conferences in their planning to match supply of shipping space with demand.

Question 2. What other mechanisms in non-U.S. trades are important in making conferences effective?

Answer. The most important is total antitrust immunity, which would exclude all activities authorised or approved under S. 1593, and all commercial activity abroad that is involved in or related to shipping services in U.S. liner trades, as advocated in the appendix to our testimony.

Question 3. Will U.S. flag carriers be able to join your member lines in consortia? Is that desirable?

Answer. Yes—if S. 1593 is adopted with the amendments we proposed, this would certainly be possible and we would hope that once this is permitted without fear of antitrust prosecutions, domestic and foreign commercial interests will find it expedient to explore mutually beneficial joint service arrangements including the formation of consortia, which would be desirable.

Question 4. Do you believe competition from independents is healthy or destructive of your effort to provide stable, efficient services?

Answer. *Commercial* competition is healthy. Non-commercial competition is destructive.

Question 5. What do you mean by "the full potential of intermodalism" and why is it necessary that carriers act through conferences by setting uniform rates, terms, and conditions for through movement of cargo to achieve that potential?

Answer. What we mean by "the full potential of intermodalism" is that conferences should be able to quote their shippers uniform conference rates for point-to-point services. In the absense of conferences having this authority, individual carrier members have to quote shippers for this service at rates which may differ significantly as between one conference carrier and another and this will produce instability and unfair discrimination as between shippers.

Question 6. How are intermodal rates and services agreed to in Europe and Japan?

Answer. The procedure in general is that conference members agree a conference rate for inland haulage. That rate is based on the conference carriers' best estimate of what they individually, in the aggregate, will have to pay. If the shipper authorises his conference carrier to go ahead and deliver inland at the conference tariff rate, the carrier will charge the shipper in accordance with the tariff but will negotiate the best rate he can get on a one-to-one basis, with the inland haulage carrier. On this transaction the ocean carrier might make either a profit or a loss, but that is the luck of the draw and the operation of a free market. In all instances the shipper has the right to reject the conference charge and service for inland haulage and make his own inland transport arrangements.

Question 7. Do conferences negotiate with inland carriers?

Answer. No, to the best of CENSA's knowledge.

Question 8. Please explain why it is so necessary to carefully draft the immunity section to avoid the re-entry of the antitrust problems created by the *Carnation* and *Sabre* cases.

Answer. To give conferences the necessary legal protection to promote investments and the best use of resources in the interests of the trade as a whole.

Question 9. In Europe, do you negotiate rates with shippers' councils or merely consult on general rate levels?

Answer. In Europe conferences consult on general rate levels with shippers' councils—they do not negotiate rates with those bodies.

Question 10. What other subjects are open to discussion?

Answer. Any matter of common interest.

Question 11. Can conferences and shippers' councils enter agreements with each other?

Answer. No, not in the legal sense as neither conferences nor shippers' councils are legal entities.

Question 12. Have U.S. laws had an inhibiting effect on the relations between conferences operating in the North Atlantic and the various European shippers' councils interested in these trades?

Answer. Yes because the American conference carriers are unable to participate in conference/shippers' council consultations owing to fears of prosecution under the U.S. antitrust laws.

Question 13. Do you believe S. 1593 adequately expedites FMC approval of agreements?

Answer. On the whole, "yes". But we would urge the adoption of the amendments for Section 6 proposed in the appendix to our testimony.

Question 14. When one member of a conference believes strongly that a rate on one or more commodities should be cut but the other members disagree, is it healthier for the trade to permit that carrier to engage in independent rate action or to risk his leaving the conference?

Answer. In general the mandatory right of a conference member to exercise independent rate action attacks the very foundation of the conference system and is a totally destructive weapon in that it would destabilise rate and service structures and undermine healthy, effective conference. On the question of whether it is healthier for the trade to permit a carrier to engage in independent rate action or to risk his leaving the conference, this could vary from trade to trade. The essential requirement is that the conferences themselves should be permitted to decide whether or not it is in the best interests of their particular trade to permit some form of independent rate action.

Question 15. Do you believe that foreign liner operators are more likely to co-operate with independent neutral bodies than with the FMC? Why?

Answer. Yes, because there is no possibility of conflicts of laws in providing what is commercially sensitive and confidential information to independent policing bodies which are not governmental bodies.

Question 16. Clearly, your members are more or less free of regulation at home. What if any, problems will continue to exist, even after enactment of S. 1593 or S. 125, as a result of unilateral U.S. shipping regulations in international shipping trades?

Answer. It might be convenient broadly to categorise the problem in liner shipping in our trades with the U.S.A. as fundamental differences in:

(a) competition policy, that is to say the implementation of anti-trust laws and

(b) jurisdiction, in the absence of intergovernmental agreement on mutually compatible limits to the territorial reach of each country's jurisdiction over international shipping. We believe enactment of S. 1593, with the amendments we propose, will go a long way to alleviating both aspects of this problem but we still think the question of overlapping and conflicting jurisidiction requires the attention of our governments.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question 1. I believe conference agreements, and pooling agreements, cargo sharing agreements, etc., among conference members have at times been regarded by the Department of Justice and/or the FMC as restricting or preventing competition from independents who operate outside the conference.

One provision in Section 4 of S. 1593, only permits agreements for economic co-operation among conference members which prevents competition among themselves. And, another Section of S. 1593, prohibits carriers from "engaging in any practice designed to reduce or eliminate the participation of non-conference carriers".

Another provision of Section 4, however, permits conferences to pool earnings, or traffic.

(A) My question is: does S. 1593 permit pooling agreements, and other agreements for economic co-operation among conference members inasmuch as these agreements may prevent competition from outsiders, and may reduce or eliminate the participation of non-conference carriers?

(B) The FMC has approved space chartering agreements among Japanese carriers, and I believe recently approved a space chartering agreement among American carriers.

Inasmuch as space charter agreements are not specifically authorized under Section 4 of S. 1593, and inasmuch as these agreements may "prevent competition from outsiders" and/or "reduce or eliminate the participation of non-conference carriers", would they be authorized under Section 4 of S. 1593?

Answer. (A) No, unless amended as suggested in the appendix in our testimony which proposed that the words "among themselves" in Section 4(a)(6) be deleted.

(B) We believe Section 4(a)(5) and (6) cover, amongst other arrangements, space charter agreements. But as our answer to (A) above indicates, antitrust immunity is not clear unless 4(a)(6) is amended as indicated above.

Question 2. S. 1593 repeals the *Svenska* test so that the FMC could not apply antitrust standards in disapproving agreements.

Moreover, under S. 1593, the Department of Justice could not be a party in any proceeding before the FMC to disapprove an agreement.

Yet, because of the limited scope of the antitrust exemption under S. 1593, many agreements might be subject to the antitrust laws.

Isn't it reasonable to assume that this statutory scheme will encourage the Department of Justice to invoke the antitrust laws in the courts, in cases where it now intervenes before the FMC and raises the Svenska test under the Shipping Act?

Answer. Yes. We believe the problem could be overcome if the amendments to S. 1593 we propose in our appendix are accepted.

Question 3. Your testimony urges that the antitrust exemption in S. 1593 be stricken because it is inadequate.

(A) From CENSA's viewpoint, is the antitrust exemption in S. 125 preferable to that in S. 1593?

(B) Have the antitrust laws ever been invoked against any of the CENSA members?

Answer. Our testimony does not urge that the antitrust exemption in S. 1593 is stricken. However, we agree it is inadequate and have made proposals in the appendix attached to our testimony as to how this problem might be overcome.

(A) In our view there is not a great deal to choose between the antitrust exemptions in S. 125 and S. 1593. We believe neither bill gives the total antitrust exemption that is required and with regard to S. 125, this is illustrated in the second appendix (commentary on S. 2585) attached to our testimony. However, we believe that the anti-trust exemption in S. 1593 can be more readily clarified than in S. 125, as explained in the appendices attached to our testimony.

(B) Yes.

Question 4. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?.

Answer. To give a definite answer to this question, we would need to know the contents of the total regulatory package proposed. Filing of tariffs (as opposed to making them readily available to interested parties) is not a requirement in non-U.S. trades. It is currently a requirement in the U.S. trades as it is part and parcel of obtaining antitrust immunity. If that necessary immunity was effectively granted without the requirement to file, then this would bring U.S. procedures closer into line with what happens elsewhere in the world. But it will be appreciated that in trades elsewhere, there is no panoply of requirements and prohibitions which currently exist under your laws. An important point to bear in mind in this question is the implication for effective implementation of Section 10 of S. 1593 if tariff filing is to be discontinued.

Question 5. (A) It has been said that a provision in S. 125 establishes a policy in favor of intergovernmental maritime agreements and is therefore promotional in nature because it gives a presumption of approval by the FMC to any bilateral agreement which implements an intergovernmental maritime agreement.

Under S. 1593, the burden of proof to disapprove such a bilateral agreement would be on the opponents of the agreement.

It seems to me, both bills operate about the same in this respect, and that neither establishes a policy in favor of government bilaterals. What are your views?

(B) Inasmuch as the FMC must approve bilateral agreements which implement intergovernmental maritime agreements, shouldn't the FMC participate in negotiation of the intergovernmental agreements to assure that the provisions agreed upon by the countries are capable of being implemented by bilaterals which are consistent with our shipping laws.

Answer. (A) We believe that S. 125 does indeed establish a policy in favor of intergovernmental maritime agreements with cargo sharing provisions and we have commented extensively on this in the second appendix attached to our testimony.

(B) CENSA is opposed to the policy of intergovernmental bilateral cargo sharing agreements which policy is also in conflict with the OECD convention and the recently reaffirmed Trade Pledge.

Question 6. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill as S. 1593 provides might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril?

Answer. We believe this problem could be overcome if Section 8 of S. 1593 is amended as we have proposed in the appendix attached to our testimony.

Question 7. As I read S. 1593, the activities of non-vessel operating common carriers would not be exempt from the antitrust laws.

Should they be treated differently than ocean common carriers?

Answer. CENSA continues its serious misgivings about perpetuating the legal fiction of a NVOCC, created by the FMC's predecessors in order to gain regulatory jurisdiction over this hybrid variety of shipper. We have nevertheless addressed this issue in some detail in the appendix attached to our testimony where in broad terms we have indeed suggested that NVOCCs should be treated differently to ocean common carriers but that they should be in general subject to the same regulatory requirements particularly on the question of filing of and adherence to tariffs.

Question 8. The FMC and the Department of Justice have in the past maintained that many agreements for economic co-operation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conference. In many cases, however, the FMC has still approved them under its

Section 15 authority, and they have thus received immunity from the antitrust laws.

As I read S. 1593, however, it may not give antitrust immunity to many of these agreements because they may prevent competition from carriers outside of the conference.

Answer. We believe we have covered this point in our answer to question 1 above.

Question 9. The National Maritime Council of Washington, D.C., published a document entitled "The American Maritime Industry," dated 1980. In this publication, in the appendix they have cargo reservation laws and other discriminatory practices enacted by foreign nations for their national flag carriers as of 1979. I think it includes just about every nation on the map.

Do you think that these laws that are set forth in this appendix should be considered seriously by the United States? I am assuming you have read this.

Answer. We had not, in fact read the publication in question. We have now obtained a copy of Appendix 1 of the publication which is the section of it to which you refer. The only CENSA countries listed therein are France, Germany, Japan and Portugal and we would comment on the details listed against each of these countries as follows:

FRANCE

OIL IMPORTS

CENSA has already testified on this matter at the time Congress was considering the oil cargo preference bill. French legislation does not include strict cargo reservation. The oil companies operating in France have to have French flag tonnage or charter tonnage capable of carrying two-thirds of French oil imports. This is an obligation of means, or rather of capacity, and not a cargo reservation measure. This legislation was mainly enacted (before the last world war) for reasons of security of supply in case of crisis. But in fact there are many French tankers in the cross trades and an important part of French oil imports is carried by foreign ships.

NATIONAL DEFENCE GOODS

Most countries consign the carriage of national defence cargoes to national flag ships.

COAL

The decree and law of nearly half a century ago (before the last world war) still exists but implementation is not strict. In fact less than 40 percent of coal imports are carried by French flag ships and in practical terms the law has little direct application.

COASTWISE TRAFFIC

It is true that French flag ships have a monopoly on coastwise traffic in Metropolitan France. Other countries including the USA, have similar provisions. Nevertheless, the French Maritime Administration grants many derogations for the chartering of foreign ships. As regards the traffic between ports of the French department of La Guyane, La Guadeloupe and La Martinique and Metropolitan France, there is no monopoly on this traffic which is included in a "section" of the WITASS Conference. There do not appear to be many foreign ships in this trade and the reason is the trade is already covered by French flag ships. But there are foreign flag non-conference ships in the trade from time to time.

MARITIME AGREEMENTS WITH THE IVORY COAST AND MOROCCO

France has concluded maritime agreements with these countries on the basis of "equal terms". But as far as the 40/40/20 clause is concerned—which does not include bulks—this cargo sharing arrangement falls within the competence of the liner conferences concerned. These conferences apply this arrangement, on a commercial basis, according to the spirit of the UNCTAD Code of Conduct on which the EEC countries have reached a well-known agreement. It must be emphasised that the conclusion of these maritime agreements had become necessary after the introduction by these countries of their well-known discriminatory legislation under which the French lines suffered heavy damages. The US Government itself has of course concluded several equal access agreements with South American countries for exactly the same reasons.

MARITIME AGREEMENTS WITH ALGERIA AND TUNISIA

As is well known, before their independence, these countries were French departments or mandated territories and consequently the maritime services between their ports and the mother country were submitted to a monopoly (like the trade between the Virgin Islands and the USA) for French flag ships. When these countries obtained their independence, they concluded maritime agreements with France according to which the dry cargo traffic between French and Algerian and Tunisian ports is reserved jointly to French, Algerian and Tunisian flag ships. However, derogations can be obtained for charters subject to the approval of the Maritime Administrations concerned.

Germany

CORPORATE TAX REDUCTION

Shipowners and operators residing in Germany may, under certain conditions, enjoy a reduction by 50 percent of the normal personal income tax. This, however, only applies to earnings resulting in services to the foreign trade and is limited to 80 percent of those profits. Furthermore the respective vessel must be registered in Germany and flying the German flag. A similar 50 percent reduction is granted on the corporate tax to the extent that the provisions are not distributed among the shareholders. On the other hand it has to be noted that German shipowners—in contrast to those in other shipping countries—are liable to pay so-called industrial tax (Gewerbesteuer), as well as a property tax.

TAX FREE FUEL

This is correct and the tax exemption is applicable to both fuel tax and VAT, no matter whether or not the owner is a resident of the Federal Republic of Germany.

POWER TO RESTRICT THE CONCLUSION OF FREIGHT CONTRACTS AND CHARTERS

The German Government is empowered under paras. 44 and 46 of the Foreign Trade Regulation to restrict the conclusion of freight contracts and charters between German residents and carriers which are residents of countries listed in so-called country lists. These lists contain, as a rule, those countries which exclude or limit the participation of German ships in the carriage of their national seaborne trade. This regulatory instrument is therefore of a rather theoretical nature and has not been used in practice for several years.

MARITIME AGREEMENT WITH SOUTH KOREA

There is no cargo sharing agreement in existence between the Federal Republic of Germany and South Korea. Indeed the agreement that does exist with south Korea undertakes that both parties abstain from discriminatory measures "that might impair the maritime shipping of the other contracting party or prejudice the choice of flag according to the principles of free competition".

MARITIME AGREEMENT WITH THE IVORY COAST

A bilateral agreement was concluded between Germany and the Ivory Coast on 18.12.61. An additional Protocol signed on 13.6.77 contains a cargo sharing agreement based on the 40/40/20 principle. Both contracting parties, however, reserve their right freely to dispose of their entitlements under the Protocol. Certain bulk cargoes and other commodities such as fruit, vegetables and sugar are excluded from the Agreement. It must be emphasised that the conclusion of the Agreement/Protocol had become necessary after the introduction by the Ivory Coast of their well-known discriminatory legislation under which the German lines suffered heavy damages. The U.S. Government itself concluded several equal access agreements with South American countries for exactly the same reasons.

MARITIME AGREEMENT WITH BRAZIL

A bilateral agreement, between Germany and Brazil was signed on 4.4.79 and entered into force on 5.6.80. An additional Protocal covers the principle of equal rights in the cargo volume and revenue in the bilateral trade. Here again it must be emphasised that the conclusion of the agreement had become necessary as a result of the introduction by Brazil of its well-known discriminatory legislation under which the German lines suffered heavy damages. The U.S. Government itself has concluded several equal access agreements with South American countries for exactly the same reasons.

JAPAN

TAX CREDITS

Japan does *not* give tax credit against earnings in the foreign trades.

TAX EXEMPTIONS

The tax exemptions cited were abolished on 1st April 1972 and have not been reintroduced.

"Ship Japanese" Policy

Japan has no "ship Japan" policy or administrative guidance to this effect.

Maritime Agreements

Japan has no bilateral maritime agreements with Taiwan or South Korea. It does, however, have an agreement with the Peoples' Republic of China but that agreement does not include any cargo sharing provisions or provisions which are detrimental to third countries.

PORTUGUAL

Law 75-U/77

The article 1 of decree law 75-U/77 stipulates that all goods imported by sea by any public administrative body or by any state enterprise shall preferably be carried in Portuguese vessels or, failing that, in foreign ships chartered by national shipowners; up to 50 percent of the import and export consignments covered by the provisions of article 1 may be freed for carriage in foreign flag ships, in particular those of the importing or exporting country provided that the legislation of such countries grants equal treatment to Portuguese vessels.

Maritime Agreements with the USSR and with Mozambique

There are no cargo reservation maritime agreements with these countries.

Senator **GORTON**. Our final witness for today will be John Kauffman, chairman of the board of Westwood Shipping Lines.

STATEMENT OF JOHN KAUFFMAN, CHAIRMAN OF THE BOARD, WESTWOOD SHIPPING LINES, AND VICE PRESIDENT-DIRECTOR OF TRANSPORTATION, WEYERHAEUSER CO., ACCOMPANIED BY ROBERT DOWDY, COUNSEL

Mr. **KAUFFMAN**. Mr. Chairman, I am accompanied by Robert Dowdy, Westwood counsel.

My testimony will be an abbreviated version of our statement that was submitted for the record.

My name is John Kauffman and I am chairman of the board of Westwood Shipping Lines, a Weyerhaeuser Co. subsidiary. Westwood is a common carrier in the foreign commerce of the United States. We transport containers and bulk cargoes between the west coast of the United States and the United Kingdom, continental Europe, and the Scandinavian Peninsula.

Westwood is an independent carrier. It does not belong to either of the conferences on this trade route. Westwood is the only independent, all-water, liner service in this trade.

Westwood has one concern with S. 1593. This relates to the intent of section 7(a)(4). This section makes it a breach of contract for a shipper with a loyalty contract to permit itself to be divested of the right to select the carrier to transport a shipment, with the intent to avoid its obligations under a loyalty contract. This provision has its origin in section 14(b) of the Shipping Act and is, therefore, not new to this bill. However, S. 1593 does add a provision to the existing law that shifts the burden of proof in any contract dispute to the contract shipper.

Many of Westwood's customers purchase goods from sellers who have loyalty contracts with the conference. In negotiating their sales contracts, these customers purchase the goods free alongside, or free on board, our vessels at the port of origin. A purchase made in this fashion normally allows the buyer to select the carrier, because the buyer owns the goods at the point of origin, the load port.

There is a belief held in some quarters that Congress intended this law to prohibit these kinds of transactions. This confusion arises because the law calls into question the intent of a contract seller in allowing his purchaser to buy goods on these terms—free alongside or free on board. The provision in S. 1593, shifting the burden of proof, would merely enhance this confusion.

In raising this concern, I want to make it clear that Westwood does not question the proposition that contract sellers who have the legal right to select a carrier are required by the loyalty contracts to use conference carriers. However, we are concerned that the law clearly affirm the right of a person who has no loyalty contract with the conference to obtain the right to select the carrier.

Westwood believes it was the intent of the Congress, in enacting section 14(b), to preserve the right of a seller with a loyalty contract to sell its products on any terms and conditions satisfactory to it. In 1961, when section 14(b) was enacted, the legislation specifically covered only goods on which a contract shipper had the legal right to select the carrier.

Moreover, in implementing section 14(b), the Federal Maritime Commission required all dual rate contracts to "expressly state that nothing therein shall require the merchant to forego a sale unless the shipment is made on a conference vessel." Therefore, Congress intended the terms and conditions of sale to be left to negotiations between the buyer and the seller.

The policies that led to Congress' decision in 1961 still exist today. U.S. exporters and importers must have the freedom to sell and buy on terms and conditions that are dictated by the marketplace, in order to be competitive in world trade. The purchaser has a direct economic interest in the cost of the ocean transportation, in as much as this cost is a part of the delivered price of the goods he is purchasing.

Westwood believes that the provision in S. 1593 that shifts the burden of proof to contract shippers should be deleted from the bill. This provision would change the present law with respect to burden of proof, as established by the Federal Maritime Commission. The Commission permitted certain specific conduct by the contract shipper to raise a rebuttable presumption of breach, but expressely rejected "any clause which places the burden of proof, as such, on the merchant."

Westwood believes any departure from the present law would discourage contract shippers who wish to exercise their lawful rights to sell on terms that grant the other party the right to select the carrier.

I am sure this committee knows that a loyalty contract is a device whereby a shipper agrees to use exclusively the services of a conference, and in return receives a lower rate on its shipments. It is what we used to call a "dual rate contract." In view of the fact that there is only limited regulatory review of the level of ocean freight rates—the previous witness used the word "benign"—the principal protection from the price fixing of conferences is the presence of strong independent carriers.

However, independent carriers such as Westwood cannot provide this competition unless it is clear in the trade that persons with loyalty contracts have the freedom to sell or buy on terms negotiated in the market place.

Westwood respectfully urges this committee to do two things to clarify S. 1593:

First, we urge this committee to delete the provision of the bill that would shift the burden of proof to contract shippers, a provision that would alter dramatically the existing law.

Second, we urge this committee to clarify that nothing in section 7(a)(4) is intended to prevent a contract shipper from selling and buying goods on terms satisfactory to it. In this regard, we recommend the bill include in it the language presently required by the Federal Maritime Commission's regulations in dual rate contracts.

Except for these changes, Westwood supports the objectives of S. 1593. We support the decision to continue the present law allowing decreases in rates to become effective immediately, rather than after a period of delay. Any delay in the introduction of a rate decrease would simply serve to protect conferences from price competition by independents, without a corresponding benefit to the shipping public.

We respectfully request the committee's permission to supplement our written statement with comments on S. 125 that were previously submitted to the staff.

I want to thank the committee for giving Westwood, an independent carrier, the opportunity to be heard on this important piece of maritime legislation.

Senator **GORTON**. As I understand it, Mr. Kauffman, loyalty contracts apply only to cargoes for which the shipper has the right to select the carrier—shipment c.i.f.

Your concern is that after entering a loyalty contract with a carrier, a shipper should still be able to sell f.o.b. to a purchaser and to permit the purchaser to select the vessel, unemcumbered by the loyalty obligation. Is this an issue important to all independent carriers, or only to Westwood?

Mr. **KAUFFMAN**. I feel it is an issue important to all independent carriers. However, I can only speak for Westwood. But I feel that independent carriers, being in competition with well entrenched, strong, powerful conferences, require this freedom in order to be able to enter a trade.

Senator **GORTON**. Because of the time, I will submit additional questions to you in writing, and hope that you will respond to them.

Senator Inouye.

Senator **INOUYE**. The prior witness suggested that, if closed conferences should establish artificially high tariffs, independent carriers will come into the market and compete, and thereby reduce it. Is that reality, under the present laws?

Mr. **Kauffman**. I think there is a sense of reality. It reenforces, it emphasizes our concerns with regard to shifting the burden of proof, because this would inhibit an independent carrier from entering a trade where there are these closed conferences that you referred to. Because we must remember that the conference has previously established the loyalty contracts with many shippers.

Senator **Inouye**. Is it your suggestion that at the present time, under the present rules and regulations, independent operators have difficulty in competing with closed conferences?

Mr. **Kauffman**. Well, it's always difficult to compete with a strong competitor—but that, we accept.

We are concerned that we are put at a significant disadvantage with no commensurate public benefit. We are concerned about the change in the law, shifting the burden of proof.

Senator **Inouye**. Do you believe that change would destroy the closed conferences?

Mr. **Kauffman**. No. It would strengthen the closed conferences. It would strengthen all conferences.

Senator **Inouye**. I have other questions I would like to submit for your consideration and response.

[The statement follows:]

Statement of John G. Kauffman, Chairman of the Board, Westwood Shipping Lines, Inc.

My name is John Kauffman and I am Chairman of the Board of Westwood Shipping Lines, a Weyerhaeuser Company subsidiary. Westwood is a common carrier in the foreign commerce of the United States subject to regulation under the Shipping Act of 1916, the law that S. 1593 would amend if passed by Congress. We transport containers, forest products and other bulk cargoes between the West Coast of the United States, on the one hand, and the United Kingdom, Continental Europe and the Scandinavian Peninsula, on the other hand. Westwood is an independent carrier; it does not belong to either the Pacific Coast European Conference or the North Europe-United States Pacific Conference, the two conferences to which all our water competition belong. Westwood is the only independent, all water, liner service in this trade.

Westwood has one concern with S. 1593 that relates to the intent of Section 7(a)(4). This section makes it a breach of contract for a shipper with a loyalty contract to permit itself to be divested of the right to select the carrier to transport a shipment with the intent to avoid its obligations under a loyalty contract. The provision has its origins in Section 14(b) of the Shipping Act and is, therefore, not new to this bill. However, S. 1593 does add a provision to the existing law that shifts the burden of proof in any contract dispute to the contract shipper.

Unfortunately, the rights of contract shippers have been the source of some confusion in our trade. Many of Westwood's customers purchase goods from sellers who have loyalty contracts with the conference. In negotiating their sales contracts, these customers purchase the goods free alongside, or free on board, our vessels at the port of origin. A purchase made in this fashion normally allows the buyer to select the carrier because the buyer owns the goods at the point of origin. The confusion to which I referred is the belief, held in some quarters, that Congress intended this law to prohibit these kinds of transactions. This confusion arises because the law calls into question the intent of a contract seller in allowing his purchaser to buy goods on these terms. The provision in S. 1593 shifting the burden of proof would merely enhance this confusion. In raising this concern, I want to make it clear that Westwood does not question the proposition that contract sellers who have the legal right to select the carrier are required by their loyalty contracts to use conference carriers. However, we are concerned that the law clearly affirm the right of a person who has no loyalty contract with the conference to obtain the right to select the carrier.

Westwood believes it was the intent of the Congress in enacting Section 14(b) to preserve the right of a contract seller to sell its products on any terms and conditions satisfactory to it. In 1961, when Section 14(b) was enacted, the legislation specifically covered only goods on which a contract shipper had the legal right to select the carrier. Moreover, in implementing section 14(b), the Federal Maritime Commission required all dual rate contracts to "expressly state that nothing therein shall require the merchant to forgo a sale unless the shipment is made on a conference vessel." *The Dual Rate* cases, 8 FMC 16, 31 (1964); 46 CFR 538.10. It should be clear, therefore, that Congress intended the terms and conditions of sale to be left to negotiations between the seller and buyer.

The social policies that led to Congress' decision in 1961 still exist today. United States exporters must have the freedom to sell on terms and conditions that are dictated by the marketplace in order to be competitive in world markets. Similarly, United States purchasers who deal with sellers who have loyalty contracts should have the same freedom of contract as purchasers who deal with sellers who have no loyalty contract. In either case, the purchaser has a direct economic interest in the cost of the ocean transportation inasmuch as this cost is part of the delivered price of the goods he is purchasing.

Westwood believes the provision in S. 1593 that shifts the burden of prooof to contract shippers should be deleted from the bill. This provision would change the present law with respect to burden of proof as established by the Federal Maritime Commission in the 1964 *Dual Rate* cases. The Commission in this case permitted certain specific conduct by the contract shipper to raise a rebuttable presumption of breach, but expressly rejected "any clause which places the burden of proof, as such, on the merchant." *The Dual Rate* cases, supra 42. It has long been strongly entrenched in American law that he who claims a breach must prove the breach. Westwood believes that any departure from the present law would discourage contract shippers who wish to exercise their lawful rights to sell on terms that grant the other party the right to select the carrier.

I am sure this Committee knows that a loyalty contract is a device whereby a shipper agrees to use exclusively the services of a conference and in return receives a lower rate on its shipments. It is what we used to call a dual rate contract. In view of the fact there is only limited regulatory review of the level of ocean freight rates, the principal protection of United States exporters from the price fixing of conferences is the presence of stong independent carriers. However, independent carriers, such as Westwood, cannot provide this competition unless it is clear in the trade that persons with loyalty contracts have the freedom to sell or buy on any terms satisfactory to it.

Westwood respectfully urges this committee to do two things to clarify Section 7(a)(4) of S. 1593. First, we urge this committee to delete the provision of the bill that would shift the burden of proof to contract shippers, a provision that would alter dramatically the existing law. Second, we urge this committee to clarify that nothing in Section 7(a)(4) is intended to prevent contract shippers from selling and buying goods on terms satisfactory to it. In this regard, we recommend the bill include in it the language presently required by the Federal Maritime Commission's regulations in dual rate contracts. We believe these two steps would clarify the present confusion in our trade.

Except for these changes, Westwood supports the objectives of S. 1593. We support the decision to continue the present law allowing decreases in rates to become effective immediately rather than after a period of delay. 46 USC 817(b)(2). Any delay in the introduction of rate decreases would simply serve to protect conferences from price competition by independents without a corresponding benefit to the shipping public. We also support the decision to exempt forest products from the tariff filing requirements.

I want to thank this Committee for giving Westwood, an independent carrier, an opportunity to be heard on this important piece of maritime legislation.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

WESTWOOD SHIPPING LINES,
Tacoma, Wash., September 30, 1981.

Hon. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine, Room 126, Russell Senate Building, Washington, D.C.

DEAR SENATOR GORTON: At the conclusion of Westwood Shipping Lines' testimony on September 21, 1981, I was asked to respond in writing to questions that you and Senator Inouye had with respect to Westwood's position on S. 1593 and S. 125. I also indicated that I would provide for the record the comments on S. 125 that I provided to Senator Inouye earlier this year. With one exception, these comments are incorporated into the answers to the questions. The exception is the comments I provided to Senator Inouye on Intergovernmental Maritime Agreements which are included here for the record. This letter will deal first with my answers to your questions, then with Senator Inouye's questions and, finally, with our comments on the Intergovernmental Agreement provisions of S. 125.

ANSWERS TO SENATOR GORTON'S QUESTIONS

Question. As I understand it, loyalty contracts apply only to cargoes for which the shipper has the right to select the carrier (shipment C.I.F.); your concern is that after entering into a loyalty contract with a carrier, a shipper should still be able to sell F.O.B. to a purchaser, and permit the purchaser to select a vessel, unencumbered by the loyalty obligation. Is this issue important to all independent operators?

Answer. Yes. Loyalty contracts, presently called "dual rate contracts," are a marketing tool that conferences use to compete against independent carriers. Because they require a shipper to commit all or a fixed portion of its cargo to a conference, loyalty contracts are exclusive dealing arrangements that reduce the number of customers available to independents. In 1958, the Supreme Court correctly characterized dual rate contracts as having been designed by the conferences to "stifle outside competition" from independent carriers. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 493 (1958).

It is in the public interest for U.S. exporters and importers with loyalty contracts to be able to buy from, or sell to, other firms without loyalty contracts on competitive terms. A U.S. exporter's competitive position will be adversely affected if it cannot allow its foreign purchaser to lower the delivered price of the goods it is purchasing by electing to ship on a non-conference vessel. If U.S. exporters cannot provide a competitive delivered price, foreign purchasers will purchase from other sources.

It also is in the public interest to have strong independent carriers in export trades. In view of the limited authority of the FMC to regulate the level of rates, the presence of independent carriers in a trade is a shipper's primary restraint on the level at which conference rates can be fixed. Without independent carriers, shippers would be faced with a legal monopoly. The ability of independents to compete would be severely undermined if they precluded from doing business with firms having no loyalty contracts with the conference simply because such firms are purchasing from, or selling to, a firm that has a loyalty contract.

Question. Do you feel that S. 1593 and S. 125 adequately protect independent operators like yourself?

Answer. No. In order to adequately protect independent operators, S. 1593 and S. 125 should require that loyalty contracts expressly state that nothing in the contract shall require the contract signer to forgo a sale or purchase if shipment is not made on a conference vessel. In this regard, Westwood recommends two amendments to Section 7(a)(4) of S. 1593 and one amendment to Section 313(3) of S. 125.

Westwood suggests Section 7(a)(4) of S. 1593 and Section 313(3) of S. 125 be amended to include language presently required to be included in all dual rate contracts by the FMC. At the present time, the Commission requires all dual rate contracts to specifically state as follows: "Nothing contained in this Agreement shall require the shipper to refuse to purchase, sell or transfer any goods on terms which vest the right to select the carrier in any other person. Dual-Rate Contract Systems in the Foreign Commerce of the United States, 46 CFR 538.10."

The addition of this language in S. 1593 and S. 125 would codify existing law; it would not change the present law. However, Westwood believes that including this language in the proposed legislation would clarify the present confusion in the trade to which I testified. Moreover, since under S. 1593 the FMC would no longer have approval authority over the content of loyalty contracts, this provision in the Commission's regulations would have to be incorporated into legislation to survive enactment of S. 1593.

The second amendment Westwood recommends is the deletion of the provision in Section 7(a)(4) of S 1593 that places the burden of proof on the contract shipper in any loyalty contract dispute. No similar provision exists in S. 125

The FMC considered the question of burden of proof following the enactment of the amendments to the Shipping Act in 1961 and expressly rejected "any clause which places the burden of proof, as such, on the merchant" (contract shipper). *The Dual Rate* Cases, 8 FMC 16, 42 (1964). As was pointed out by the Commission, the general rule that a party who claims a breach must prove the breach is so strongly entrenched in American law that there must be some compelling reason in the case of dual rate contracts not to follow it. The Commission found no such reason in 1964 and no such reason exists today.

When S. 125 was introduced earlier this year, I provided Senator Inouye with comments on two other provisions of S. 125 which I would like to repeat here for the record. The first provision I want to comment on is Section 405(b)(1) of S. 125. This section would impose a 15-day delay on the effective date of any reduction in rates. We believe this provision is detrimental to independents, as well as to the shipping public, for the reasons set forth in below in response to questions 5, 8 and 9.

The other provision of S. 125 that Westwood feels would be unfavorable for independents is Section 310. This section would require independents to retain a neutral body to police its activities. Westwood opposes requiring nonconference carriers to retain an independent neutral to police its activities. The FMC in its own regulations has always excused individual lines and joint service agreements consisting of no more than two parties from the requirement of maintaining a self-policing arrangement. Self-Policing Requirements for Section 15 Agreements, 46 CFR 528 (1980). The principal purpose of self-policing has been to prevent an individual conference line from obtaining an advantage over its other conference members by doing something that is not permitted by the conference tariff. While there may be a need to self-police where a lawful cartel exists, nonconference lines should not be required to bear this added expense.

The present law places the obligation to insure compliance with the law on the carrier. In 1979, Congress passed Public Law 96-25 requiring the chief executive of every carrier to file a written certificate with the FMC attesting to its policy to combat illegal rebating. 46 USC 820. (1981 supplement) The FMC, in its regulations implementing this law, requires such certification to be made under oath annually on or before May 15 of each year. Certification of Company Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States, 46 CFR 552 (1980). Westwood believes that the provisions of Public Law 96-25 should be incorporated in any recodification of the Shipping Act in lieu of any new requirement for independents to retain an outside policing body. The present law places the responsibility for compliance on the carrier, where Westwood believes it should rest, and is consistent with the trend toward deregulation of the transportation industry.

Question. Would you prefer abolition of tariff filing and enforcement presently required by law,

Answer. No. The principal purpose of a tariff filing rule is to protect shippers by insuring equal rates are available to all who are similarly situated. However, some United States exports compete directly with exports from other countries that have no tariff filing requirement similar to those contained in the Shipping Act. In such cases, United States exports are put at a competitive disadvantage because foreign competitors are able to utilize filing data to undercut the delivered price of United States exports. Forest products are a U.S. export cargo which faces such foreign competitive practices in countries, such as Canada and the Scandinavian countries, where there are no tariff rules and, accordingly, would appear appropriate for tariff deregulation.

Question. Would a mandatory right of independent rate action for conference members trouble you as an independent operator?

Answer. No. Westwood believes that each conference should be free to decide whether its members should have the right of independent action. Accordingly, Westwood believes Congress should not legislate a mandatory right of independent action.

Question. Please explain why a chanage in the present law allowing *decreases* in rates to become effective immediately (as opposed to 30 days notice before increases become effective) harms the competitive position of independent. Would this be true even of a short 10-day notice requirement?

Answer. Independents usually compete on the basis of price rather than frequency of service. This certainly is true in Westwood's trade routes, where we offer only 8 percent of the all water, liner sailings in the trade. Under these circumstances, Westwood must be able to decrease its rates rapidly to attract business without having first to notify its competitors that it intends to do so. Any delay in the introduction of rate decreases, even as short as 10 days, would undermine the ability of independents to attract traffic through rate competition. Please see our answer to Questions 8 and 9 for additional comments.

Question. Do you believe that other "neo-bulk" commodities (such as iron rods) than forest products should be exempt from tariff filing? Is there any basis for distinguishing among different types of "neo-bulk"?

Answer. During the 96th Congress, the House Merchant Marine and Fisheries Committee's report on H.R. 6899, The Omnibus Maritime Regulatory Reform, Revitalization and Reorganization Act of 1980, defined and explained the intent of the term "neo-bulk". Like S. 1593, H.R. 6899 defined "bulk cargo" to include cargo commonly termed "neo-bulk, " such as forest products. In the hearings on H.R.

6899, forest product manufacturers supported this new definition of bulk cargo. These manufacturers intended this definition to replace the exemption for softwood lumber contained in Section 18 of the Shipping Act.

Westwood believes that such is the intent of S. 1593, and strongly supports the provision. However, Westwood does not similarly advocate broadening the definition of "neo-bulk" to commodities other than forest products, since this would extend the provision far beyond the purposes of the historic "softwood lumber" exemption it is intended to replace.

If the Committee wishes to make a distinction between different types of cargoes which might be classified as "neo-bulk" for purposes of expanding the exemption, it could perhaps do so using the general criteria set forth in the Committee report on H.R. 6899. House Committee Report on Omnibus Maritime Regulatory Reform, Revitalization, and Reorganization Act of 1980, H.R. Doc. No. 96-935, 96th Cong. 2d Session 35 (1980).

ANSWERS TO SENATOR INOUYE'S QUESTIONS

Question. Should any recodification of the shipping Act of 1916 include the maritime labor legislation passed last year?

Answer. The amendment made to the Shipping Act on August 8, 1980 by PL 96-325 should be incorporated into S 1593. 49 USC 814 (1981 supplement).

Question. Will failure to require some advance notice of rate decreases encourage discriminatory arrangements between shippers and carriers to the disadvantage of the shipping public?

Answer. No. Decrease in rates are required to be filed with the FMC and are, therefore, available to all shippers on an equal basis. Moreover, it is common practice for carriers to inform shippers in advance of changes in rates, so advance notice to the shipping public does, as a practical matter, occur. It is only a carrier's competition that will have no advance notice of decrease.

Question. Would advance notice of decrease in rates increase the ability of conferences to meet price reductions by independents?

Answer. Yes. Conferences with no right of independent action must meet and collectively agree on whether to meet a lower rate set by an independent carrier. Advanced notice of decreases would afford conferences time in which to hold such price meetings. while denying the shipping public the benefits of the lower rate for the advanced notice period.

OTHER COMMENTS ON S. 125

In addition to our comments on S 125 that are contained in the foregoing answers, Westwood would like to comment on Section 901(a)(7) of S 125 which deals with Intergovernmental Maritime Agreements.

Section 901(a)(7) is similar to Section 102 of the Omnibus Maritime Bill (H.R. 6899) considered by the Congress last year. Sections 102(c)(1) through (4) of H.R. 6899 contained similar requirements for Intergovernmental Maritime Agreements to those contained in Sections 901(a)(1) through (7) of S 125. At that time, we expressed a concern about the interpretation of Section 901(a)(7), formerly Section 102(c)(4) in H.R. 6899, in the case where an Intergovernmental Maritime Agreement requires the use of U.S. flag vessels, but suitable and competitive U.S. flag vessels are unavailable. In recognition of this concern, the House Report included the following explanation:

A particular Intergovernmental Maritime Agreement may or may not provide reciprocal cargo reservation for U.S flag carriers. However, if it does, the four enumerated tests in proposed Section 102(c)(1) through (4) must be satisfied. The fourth of these requirements in that there be "no provisions in the agreement and no requirements of the reciprocal nation that are *unjustly discriminatory* to United States *shippers*. . . . " (emphasis in original text)

It would appear that this standard would be contravened, for example, where a reciprocal nation imposed discriminatory cargo-reservation requirements and a U.S. exporter or importer has been relying on vessels of third-flag registry because suitable and competitive U.S. flag vessels are not available. This follows because, clearly, to allow the reciprocal nation to reserve that cargo solely for its own national carriers merely because the U.S. exporter or importer does not have recourse to U.S. flag vessels would be unjustly discriminatory. *House Committee Report on Omnibus Maritime Regulatory Reform, Revitalization, and Reorganizaion Act of 1980,* H.R. Doc. No. 96-935, 96th Cong. 2d Session 41 (1980).

We believe S 125 should either be clarified to cover this point or a similar explanation of the intent of Section 901(a)(7) be included in the legislative history of this Section.

CONCLUSION

In endeavoring to strengthen the competitive position of conferences with U.S. flag carriers, Congress should not lose sight of the fact that independents, such as Westwood, who are owned by U.S. corporations and domiciled in this country, compete against conferences composed primarily of carriers owned or controlled by foreign corporations. Westwood supports the efforts to strengthen the antitrust immunities afforded to U.S. flag joint services, but urges the Congress at the same time to take the steps I have outlined here to preserve the ability of independents to compete in the foreign commerce of the United States.

Sincerely,

JOHN G. KAUFFMAN,
Chairman of the Board.

Senator GORTON. Thank you, Mr. Kauffman.

The committee will now be in recess, and will meet again here at 9:30 a.m. on Wednesday.

Thank you all very much for attending.

[Whereupon, at 12:15 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, September 23, 1981.]

SHIPPING ACT OF 1981

WEDNESDAY, SEPTEMBER 23, 1981

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on Merchant Marine,
Washington, D.C.

The subcommittee met at 9:35 a.m. in room 235 of the Russell Senate Office Building, Hon. Slade Gorton (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR GORTON

Senator Gorton. The committee will please come to order.

This morning our hearings on S. 1593 and S. 125 shift to the comments of shippers—our importers and exporters—those who rely on the efficient, responsive, and reliable ocean transportation services we intend to encourage.

While the liner shipping industry is one of great economic importance in its own right, it serves the broad range of industries that move many, many billions of dollars worth of cargo to and from our international trading partners each year. We are concerned in these bills with the vehicles for this trade—the liner vessel operators. But we cannot lose sight of their principal importance in moving goods to market.

It is a key tenet of current U.S. policy to stimulate U.S. trade, especially exports. Therefore, we should listen to the shippers' representatives today not only for their views on the issue of shippers' councils, but also for their response to all major issues in these bills such as the scope of antitrust immunity, intermodal rate authority, conference membership, independent rate action, loyalty contracts, and tariffs.

While we move to strengthen the conference system to foster efficient, regular, and frequent service, we must be sure the conference and the carrier generally will be responsive to the shipper and that our regulations are not so cumbersome that they hinder or inhibit these trades.

Unfortunately, the ranking minority member, Senator Inouye, is unable to be with us this morning. He also has a short opening statement which I will ask to have printed in the record in full.

[The statement follows:]

Opening Statement by Senator Inouye

As the subcommittee begins its second day of hearings on maritime legislation, I am especially pleased that the witnesses whom we will hear this morning will reflect the interests of shippers.

Over the years I have heard the criticism that we in Congress are mainly concerned with ocean carriers, and do not give adequate attention to shippers when we consider maritime legislation.

During the subcommittee hearings in the last Congress I made the same observation, and assured everyone that this would not be the case. After all, ocean carriers exist to serve shippers, and not vice versa.

I therefore wish to commend the subcommittee chairman for assuring that the record of these hearings will fully reflect the views and interests of those who supply the cargo.

Senator **Gorton**. We may have Senator Long here a little bit later. We hope that he will be able to be here.

In any event, we will begin the hearings at this point with the testimony of Ralph Thayer, chairman of the Water Freight Transportation-Maritime Committee, National Industrial Traffic League.

Mr. Thayer, you may proceed. Will you introduce those who are accompanying you?

STATEMENT OF RALPH N. THAYER, CHAIRMAN, WATER FREIGHT TRANSPORTATION-MARITIME COMMITTEE, NATIONAL INDUSTRIAL TRAFFIC LEAGUE, ACCOMPANIED BY STANTON P. SENDER, TREASURER; JOHN F. DONELAN, COUNSEL; AND JOHN ARCHER, DIRECTOR OF LOGISTICS, CROWN-ZELLERBACH CORP.

Mr. **Thayer**. Mr. Chairman, members of the subcommittee, my name is Ralph N. Thayer. I'm chairman of the Water Freight Transportation Committee—Maritime Committee of the National Industrial Traffic League.

Accompanying me today are Mr. Stanton P. Sender, treasurer; John J. Archer, director of logistics for Crown-Zellerbach Corp.; and John F. Donelan, counsel.

The League agrees with the subcommittee's objectives for reforming Federal maritime regulation to improve our country's ability to compete effectively abroad. We also would urge the subcommittee to include an additional objective—balancing the needs of shippers, carriers, and the public interest. We seek this addition to assure the mutual benefit of all concerned.

The league believes that an absolute minimum of regulation in foreign commerce ocean transportation is desirable because the complexity of international trade does not permit any one nation properly to exercise jurisdiction. To this end, we believe that where effective competition exists, it should be allowed to act free of Federal interference.

However, recognizing that effective competition does not exist in all foreign markets, we believe that impartial Federal regulation is the best method of assuring that shippers, carriers, and the public interest receive equitable treatment. In reforming the Federal maritime laws, it is essential that this balance be retained.

We have reviewed S. 1593, Shipping Act of 1981, and S. 125, Ocean Shipping Act of 1980. Since S. 125 is almost identical to the reform measure passed last year by the Senate, we respectfully request that our previous comments on that bill be made a part of this hearing record.

Senator **Gorton**. They will be included.

Mr. **Thayer**. With regard to S. 1593, we would urge the subcommittee to include strengthening and improving amendments to this measure to assure that it will attain our mutual goal of a balanced reform of our Nation's maritime laws.

The first amendment we seek involves the right of independent action. We commend the subcommittee for granting this right to members of different conferences and between conferences as well as to any conference intermodal agreement. We would urge the subcommittee to extend this right to members of the same conference. We strongly support the right of independent action because it provides carriers with the flexibility they need to provide service in today's ever-changing marketplace.

We see no benefit to closed conferences because of their anticompetitive nature and their distortion of the marketplace's natural forces. We believe that the most onerous of these effects could be somewhat ameliorated by granting each conference member the mandatory right of independent action. We see this right as crucial to preventing the few powerful members from blocking other members' efforts to supply the innovative and competitive services needed by U.S. shippers and receivers.

To further encourage carrier efforts to provide innovative services and to improve a carrier's ability to exercise its right of independent action, we would urge the subcommittee to allow shippers and receivers to enter into rate and service contracts on a nondiscriminatory basis with individual carriers. This contract authority could be supplementary to conferences' rights to seek loyalty contracts. Contracting is being used successfully in the domestic surface transportation industries and is providing shippers and carriers with an extremely useful tool to meet mutual service needs. We would be glad to explore with subcommittee staff the best mechanism for instituting this authority.

The second amendment we seek involves shippers councils. While we agree with the subcommittee that there should be some mechanism for shipper/carrier consultation in the private sector, we question whether the establishment of formal shippers councils is the best means for assuring this common goal.

As an alternative, we would urge that the subcommittee consider the system used in domestic surface transportation. Under this system, shippers are allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

This system has several advantages. The first is that it does not require that shippers be regulated. Consultation is handled through the procedures of the rate bureau—the domestic counterpart to the conference. Shippers are given authority to consult through a grant of antitrust immunity to "other persons" necessary to carry out the bureau's functions.

The second is that it allows shippers the flexibility they need to meet the changing demands of the marketplace. Shippers are allowed to work with carriers on mutual problems without having to be concerned about whether they are members of the appropriate consulting organization and how quickly they could become members if they were not.

The third is that it eliminates the need for a Federal agency to oversee shipper activities since those activities are monitored through Federal oversight of the rate bureaus. The fourth is that it would reduce the Federal Government's paperwork burden since the mechanisms for monitoring carrier activities are already in place.

In addition, an approach of this type would save the Federal Maritime Commission from dealing with the knotty regulatory problems of how many shippers constitute a council, how many councils should be allowed, how these councils should be organized, what will be their reporting requirements, and so on.

The third amendment we seek involves loyalty contracts. We have two concerns in this area: shifting the burden of proof for contract violations and the discount or incentive for contract signatories.

With respect to the burden of proof, the league believes that any contract should not place any undue administrative burden upon the shipper in connection with its relationship with a conference, nor should it place any legal burdens upon the contract signatory other than those which would ordinarily face the shipper under an ordinary commercial contract. For this reason, we oppose shifting the burden of proof for contract violations from the carrier to the shipper or receiver. We also believe that a shift of this burden would be inconsistent with our system of justice which allows that the accused is innocent until proven otherwise. As an issue of basic fairness, we would urge the subcommittee to allow this burden to remain with the carriers.

As for the incentive for contract signatories, we urge the subcommittee to consider setting this figure at a somewhat lower maximum level, perhaps at about 10 percent.

In conclusion, we commend the subcommittee for avoiding the pitfalls of past reform efforts and for incorporating provisions which will greatly improve our country's ability to compete in foreign markets. These provisions include reasserting the primacy of the 1916 Shipping Act with regard to antitrust immunity; providing the country with clear objectives for maritime regulation; and recognizing the need of carriers to have the right of independent action. We also would urge the subcommittee to adopt our proposed amendments.

We offer our continuing cooperation to efforts to reform our Nation's maritime laws and look forward to working with the subcommittee to achieve a balanced reform of these laws. The league respectfully requests that it be given an opportunity to present detailed written comments for the record.

Thank you for this opportunity to present our views. We would be pleased to answer any questions you may have.

Senator GORTON. Thank you, Mr. Thayer. You state that you see no benefit in closed conferences, but mandating a right of independent action for conference carriers would ameliorate the conference's anticompetitive tendencies. Does that mean that you would have no objection to closed conferences where independent action was assured?

Mr. THAYER. No, sir. We're opposed to closed conferences as such.

Senator GORTON. So that is something of a second level choice.

Mr. THAYER. We prefer the open conference system that we have today—we would like to have the mandatory right of independent action in all those open conference contracts.

Senator **Gorton**. I see. Wouldn't independent action be so disruptive to conference stability that the advantages of rationalized services, that is, stable rates, frequent and regular sailings, and high quality of service, would be compromised?

Mr. **Thayer**. The league members have not found that, sir.

There are a number of conferences of an open nature that do have the mandatory right of independent action. We have not see the weakening or destruction of those services. We think they have improved.

Senator **Gorton**. You assert you are not convinced that establishment of formal shippers councils will provide the best means of fostering consultation with conferences. Do you, however, have any objection to the provisions of S. 1593 that permit rather than require establishment of shippers councils?

Mr. **Thayer**. The league members have considered in some depth shipper councils on at least two separate occasions. We think that the first step in this process is to get an antitrust exemption permitting consultation between carriers, conferences, groups of shippers and carriers and conferences, and between different shipper interests. The shipper council, as it is known in Europe, which is what almost everybody looks at, probably would evolve in a different way in the United States. We don't necessarily think that one shipper council will be the best immediate answer.

We think if we open the door for consultation with an antitrust immunity that this procedure may evolve in a somewhat different direction. But, we think the first thing to do is to get the consultation right.

Senator **Gorton**. So you think that that kind of change in S. 1593 would be an appropriate set of amendments?

Mr. **Thayer**. Yes, sir.

Senator **Gorton**. Have you drafted such proposals?

Mr. **Donelan**. We have not, Mr. Chairman. However, we stand ready to work with your staff. Let me say, there is a very substantial volume of experience in this area in terms of domestic surface transportation—the railroads, the truckers, and the water lines. As a matter of fact, preliminarily, but subject to check to be sure that there are not any crevices, our thought is that with respect to the present draft, which adverts to antitrust exemption, is that it should also specifically provide for the exemption of individual and collective shipper action. I have in mind section 4 and section 5 as they relate to authorized activities and agreements. We believe that the antitrust exemption under section 8 also should be extended there to shippers, either collectively or individually. Particularly in section 5 relating to conference agreements, there are very clearcut provisions for receiving shipper requests and complaints.

Now, our thought is, utilizing the benefit of the experience of the railroads, the truckers, and the domestic water lines, provision could be made whereby shippers, individually or collectively, could appear before the conferences on scheduled dockets to express their views, and derive antitrust immunity by explicit language in the statute as part of the mechanism insuring that the conference agreements work effectively.

I don't think that the language needs to be elaborate. We would be happy to tender it in a very short period of time.

Senator GORTON. It would be helpful if when you have specific amendments that you are suggesting that you submit them to us in writing so that they can be appropriately submitted.

Mr. Thayer, you suggest shippers, as an alternative to accepting the tariff rate, be able not only to seek discounts through a loyalty contract under section 7, but also be able to negotiate rate and service contracts on a not unjustly discriminatory basis with individual carriers. This, you state, is analogous to new tools permitted in domestic transportation services. How would these contracts be negotiated? How would they work? And couldn't they be negotiated with conferences?

Mr. THAYER. I believe there are some examples of this already in existence in the present conference contract system. I believe in the Pacific Coast European Conference there are rates on contract annual volume basis. I believe the Federal Maritime Commission recently had a rulemaking proceeding where they considered whether these agreements were of discriminatory nature.

I believe there already is some initial activity on privately contracting within conferences. Other conferences are saying they will not do it because they don't believe it's legal. This issue needs to be clarified. We think there's a definite benefit to be had here.

Mr. DONELAN. If I may add, with your permission, Mr. Chairman, one of the innovations in the so-called Staggers Rail Act of 1980 was section 208, which provides for the establishment of transportation contracts between rail carriers and shippers. It's quite noticeable that considerable acceleration is now taking place, as the railroads and the shippers become more familiar with the implications. The Interstate Commerce Commission has been given authority, bearing in mind the problems of the domestic rail industry, of insuring that the contracts do not interfere with the ability of the railroads to provide common carrier service. It is also of interest that I haven't heard any suggestion that the availability of these private contracts is interfering with the viability of the rate bureaus.

Senator GORTON. On the subject of loyalty contracts, assuming that there is no magic justification for the 15-percent discount, which S. 1593 permits, why do you believe 10 percent to be a better number?

Mr. THAYER. The 15 percent came about in the Bonner bill, which is Public Law 87-346. It came about as a compromise. At that time, most conferences in the United States were using 10 percent. There were one or two that were up around 30 or 35 percent. As a result of this difference, 15 percent was chosen.

Immediately, all those conferences that previously had 10 percent went to 15, which is a penalty for noncontract shippers. I also believe, in the foreign-to-foreign trade, the normal differential is between 9½ and 10 percent. We think that differential should be lowered for the benefit of those U.S. shippers who are shipping at noncontract rates.

Senator GORTON. When a conference agrees to a uniform rate, don't you believe that each carrier retains a strong motivation for innovation in order to lower its overhead and to maximize its own margin of profit?

Mr. THAYER. I think different carriers in different conferences react differently, sir. I don't think you can make a general response to that question.

Senator GORTON. They would have to have a rather weak profit motivation if they were not to do so—wouldn't they?

Mr. THAYER. I would say so.

Senator GORTON. Does the answer to this question depend to a significant degree on whether or not the conference pools its revenues?

Mr. THAYER. Well, there are different ways of pooling. A revenue pool by itself is probably the worst way to go. There are tonnage pools, and there are combination revenue and tonnage pools. It is a very complex subject and I am not an expert on pools. But I believe that the way the pooling is done outside of the United States, in some conferences, is far superior to the pooling that I am familiar with in the United States.

Senator GORTON. Do you believe that the present requirement that tariffs be filed and that all carriers, shippers, and everyone else adhere to them serves a valuable purpose?

Mr. THAYER. Yes, sir. We believe tariffs should be filed, published, and made available. The reason for that is where you have competition, it's essential that the prices be known. And the easiest way to make the rates known is to have the tariffs published.

Senator GORTON. Has it been an effective system?

Mr. THAYER. Yes, sir.

Senator GORTON. Is it responsive to the interests of the people whom you represent?

Mr. THAYER. In a general way, I would say yes, sir. We have to go in the Bonner Act again—it became mandatory then in that bill that tariffs be made available on a reasonable subscription cost. Prior to that there were many tariffs to which you could not subscribe. If you wanted to look at some tariffs, you were invited to come down and make an appointment with the conference office. Having the tariffs generally available has vastly improved the situation.

Senator GORTON. Has it facilitated or permitted competitive rate negotiations?

Mr. THAYER. Yes, sir.

Senator GORTON. Finally, would permitting rebating or unregulated prices be in the interests of shippers?

Mr. THAYER. I don't believe rebating is in anybody's interest.

Senator GORTON. Unregulated pricing?

Mr. THAYER. I'm not sure what you mean by unregulated pricing.

Senator GORTON. Just pure competition, to set rates.

Mr. THAYER. We would prefer as much effective competition as possible, within reasonable constraints, sir.

Mr. DONELAN. But where there is not effective competition, you mean you want the protection of regulatory power only sufficiently large to meet the particular problem.

Senator GORTON. I thank you all very, much. I do want to say, and this will be on the record for the balance of the witnesses, that Senator Inouye does have a number of written questions which will be submitted to you, and we may, as well, in each case, and we would appreciate your responding to them.

[The statement follows:]

STATEMENT OF RALPH N. THAYER ON BEHALF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Mr. Chairman, Members of the Subcommittee, my name is Ralph N. Thayer. I am chairman of the Water Freight Transportation—Maritime Committee of The National Industrial Traffic League. Accompanying me today are Stanton P. Sender, League Treasurer, John J. Archer, Director of Logistics for Crown Zellerbach Corporation, San Francisco, and John F. Donelan, League Counsel.

The National Industrial Traffic League is a voluntary organization of 1,800 shippers, shippers' associations, boards of trade, chambers of commerce, ports, and other entities concerned with rates, traffic and transportation services of all modes. It is the only nationwide organization which represents all types of shippers using all modes of transportation to move all types of commodities. Our members, directly or indirectly, are responsible for the routing of about 90% of our country's maritime commercial freight.

The League's primary concern is to assure that our national transportation system is sound, efficient, well-managed, and privately owned and operated, and that it meets the needs of our nation as well as the needs of shippers and receivers of commercial freight. Throughout our more than 70-year history, the League frequently has been the spokesman for business and industry on transportation matters.

The League agrees with the Subcommittee's objectives for reforming federal maritime regulation to improve our country's ability to compete effectively abroad. We concur that the U.S., through commerical means, should develop and maintain an efficient ocean transportation system to keep our country viable in the international marketplace; that carrier and conference services must be reliable and responsible; that their rates and practices must be internationally competitive and not unjustly discriminatory; and, that a single federal agency should be responsible for formulating efficient and timely regulations that will improve our nation's ability to sell its goods in foreign markets. We also would urge the subcommittee to include an additional objective—balancing the need of shippers, carriers, and the public interest. We seek this addition to assure the mutual benefit of all concerned.

The League believes that an absolute minimum of regulation in foreign commerce ocean transportation is desirable because the complexity of international trade does not permit any one nation properly to exercise jurisdiction. To this end, we believe that where effective competition exists, it should be allowed to act free of federal interference. However, recognizing that effective competition does not exist in all foreign markets, we believe that impartial federal regulation is the best method of assuring that shippers, carriers, and the public interest receive equitable treatment. In reforming the federal maritime laws, it is essential that this balance be retained.

We have reviewed S. 1593, Shipping Act of 1981, and S. 125, Ocean Shipping Act of 1980. Since S. 125 is almost identical to the reform measure passed last year by the Senate, we respectfully request that our previous comments on that bill be made part of this hearing record. With regard to S. 1593, we would urge the subcommittee to include strengthening and improving amendments to this measure to assure that it will attain our mutual goal of a balanced reform of our nation's maritime laws.

The first amendment we seek involves the right of independent action. We commend the subcommittee for granting this right to members of different conferences and between conferences as well as to any conference intermodal agreement. We would urge the subcommittee to extend this right to members of the same conference. We strongly support the right of independent action because it provides carriers with the flexibility they need to provide service in today's ever-changing marketplace.

We see no benefit to closed conferences because of their anticompetitive nature and their distortion of the marketplace's natural forces. We believe that the most onerous of these effects could be somewhat ameliorated by granting each conference member the mandatory right of independent action. We see this right as crucial to prevent the few powerful members from blocking other members' efforts to supply the innovative and competitive services needed by U.S. shippers and receivers.

To further encourage carrier efforts to provide innovative services and to improve a carrier's ability to exercise its right of independent action, we would urge the subcommittee to allow shippers and receivers to enter into rate and service contracts, on a not unjustly discriminatory basis, with individual carriers. This contract authority could be supplementary to conferences' right to seek loyalty contracts.

Contracting is being used successfully in the domestic surface transportation industries and is providing shippers and carriers with an extremely useful tool to meet mutual service needs. We would be glad to explore with subcommittee staff the best mechanism for instituting this authority.

The second amendment we seek involves shippers' councils. While we agree with the subcommittee that there should be some mechanism for shipper/carrier consultation in the private sector, we question whether the establishment of formal shippers councils is the best means for assuring this common goal.

As an alternative, would urge that the subcommittee consider the system used in domestic surface transportation. Under this system, shippers are allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

This system has several advantages. The first is that it does not require that shippers be regulated. Consultation is handled through the procedures of the rate bureau—the domestic counterpart to the conference. Shippers are given authority to consult through a grant of antitrust immunity to "other persons" necessary to carry out the bureau's functions. The second is that it allows shippers the flexibility they need to meet the changing demands of the marketplace. Shippers are allowed to work with carriers on mutual problems without having to be concerned about whether they are members of the appropriate consulting organization and how quickly they could become members if they were not. The third is that it eliminates the need for a federal agency to oversee shipper activities since those activities are monitored through federal oversight of the rate bureaus. The fourth is that it would reduce the federal government's paperwork burden since the mechanisms for monitoring carrier activities are already in place.

In addition, an approach of this type would save the Federal Maritime Commission from dealing with the knotty regulatory problems of how many shippers constitute a council, how many councils should be allowed, how these councils should be organized, what will be their reporting requirements, and so on.

The third amendment we seek involves loyalty contracts. We have two concerns in this area: shifting the burden of proof for contract violations and the discount or incentive for contract signatories.

With respect to the burden of proof, the League believes that any contract should not place any undue administrative burden upon the shipper in connection with its relationship with a conference, nor should it place any legal burdens upon the contract signatory other than those which would ordinarily face the shipper under an ordinary commercial contract. For this reason, we oppose shifting the burden of proof for contract violations from the carrier to the shipper or receiver. We also believe that a shift of this burden would be inconsistent with our system of justice which allows that the accused is innocent until proven otherwise. As an issue of basic fairness, we would urge the subcommittee to allow this burden to remain with the carriers.

As for the incentive for contract signatories, we urge the subcommittee to consider setting this figure at a somewhat lower maximum level, perhaps at about 10 percent.

In conclusion, we commend the subcommittee for avoiding the pitfalls of past reform efforts and for incorporating provisions which will greatly improve our country's ability to compete in foreign markets. These provisions include: reasserting the primacy of the 1916 Shipping Act with regard to antitrust immunity; providing the country with clear objectives for maritime regulation; and, recognizing the need of carriers to have the right of independent action. We also would urge the subcommittee to adopt our proposed amendments.

We offer our continuing cooperation to efforts to reform our nation's maritime laws and look forward to working with the subcommittee to achieve a balanced reform of these laws. The League respectively requests that it be given an opportunity to present detailed written comments for the record.

Thank you for this opportunity to present our views. We would be pleased to answer any questions you may have.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question 1. With respect to loyalty contracts, do you believe the maximum discount (or incentive) for shippers should be 10 percent? I believe under S. 125 it is 18 percent; and under S. 1593 it is 15 percent. These loyalty contracts are tying devices intended to tie the shippers to the conference. Do you believe a 10-percent discount is sufficient incentive?

Answer. Yes. Setting the penalty for non-contract signatories at the 10-percent level will harmonize U.S. practice with that of the international marketplace in accordance with the objectives of the proposed legislation. World practice sets this penalty at between 9.5 percent and 10 percent.

Question 2. Would you please furnish the committee with draft statutory language to implement your alternative suggestion that shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose?

Answer. In S. 1593, Shipping Act of 1981, introduced August 3, on page 6, strike lines 20 through 22; on page 8, strike lines 16 through 25; on page 10, lines 14 through 15, strike "and shippers' councils in their trade." and insert in lieu thereof ", either collectively or individually, in their trade."; on page 10, strike lines 16 through 25; and, on page 15, lines 12 through 13, strike "section 4;" and insert in lieu thereof, "sections 4 and 5 of carriers and shippers, either collectively or individually."

Question 3. Should NVOCCs be relieved of their present obligation to file tariffs?

Answer. To the extent that they are subject to federal economic regulation, whether for the domestic or international portion of their operations, they should be required to file tariffs. To the extent that they are free of federal regulation, they should not be required to do so.

Question 4. S. 1593 provides that an agreement could be disapproved if it is shown by opponents to be (I) "unjustly discriminatory," or (II) "detrimental to the commerce of the United States." Do you believe these two standards are sufficiently clear and precise so that shippers will readily know their rights under the law to file timely protests with the FMC; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. We believe that these standards could be strengthened and improved by the inclusion of two additional criteria: (a) "to be contrary to the public interest"; and (b) "to be in violation of the Act." We would define "public interest" as "the interest of the United States in assuring the maintenance of a dependable, competitive common carrier service responsive to the needs of the American shipper in the water-borne foreign commerce of the United States."

Question 5. (A) In your view, do conference pooling agreements and space chartering agreements prevent or regulate competition from outsiders?

(B) Should antitrust immunity extend to these kinds of activities?

Answer. (A) In general, we believe that these types of agreements are anticompetitive and serve as a disincentive to the innovative and competitive services needed by U.S. shippers and receivers. However, there are special cases where they may be necessary to provide needed rationalization. We believe that any of these agreements should be subject to FMC review as to their anticompetitive effects according to the standards set forth above. If they are able to pass these precise standards then they should receive FMC approval and be allowed to take effect.

(B) We believe that antitrust immunity should be granted only to those agreements which receive FMC approval according to the procedures outlined above. In addition, we should recommend that intercarrier pooling agreements be subject to the same conditions as those discussed above.

Question 6. If the requirement to file tariffs was removed, what would be some of the possible adverse consequencies in the U.S. liner trades?

Answer. Where effective competition exists, we see no adverse effects in dropping the requirement that carriers file tariffs. However, where federal economic regulation is necessary to take the place of effective competition, we believe that tariffs are necessary. We do not believe that a system of impartial federal regulation can be effective without this important monitoring device.

Question 7. Should the FMC be deprived of the power to require filing of special reports? The current Shipping Act (Section 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. To assure that U.S. carriers are not placed at a competitive disadvantage with their foreign counterparts, one of the objectives of the proposed legislation, we believe that any reporting requirements imposed by the Federal Maritime Commission should be limited to those which can be applied to domestic and foreign carriers alike.

Question 8. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill, as S. 1593 provides, might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement at their peril, and they might be reluctant to take the risk?

Answer. We are not aware that this is a problem of any significant magnitude. Grandfathering existing loyalty contracts should do much to assuage any present concerns on this issue.

Question 9. Should the activities of Non-Vessel Operating Common Carriers be exempt from the antitrust laws; or should they be treated differently from ocean common carriers?

Answer. We believe that the domestic activities of NVOCCs should be regulated in accordance with current U.S. law and that their international activities should be regulated in accordance with international law. We believe that NVOCCs should not be treated as ocean common carriers, but rather, that they should be accorded the same treatment granted ocean freight forwarders.

Question 10. Should independent ocean fright forwarders be licensed by the FMC?

Answer. To the extent that federal economic regulation is necessary to assure the mutual benefit of shippers, carriers, and the public interest, they should be licensed.

Question 11. U.S. carriers, U.S. ports in the northeast, and on-shore maritime labor are suffering because shipments of cargoes from the U.S., which should naturally be exported from U.S. ports (and vice versa for imports), are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to the carriage of these cargoes. Among other things, this means that a shipper can accept rebates, which would be illegal in the U.S., from an ocean carrier who picks up or discharge such cargoes at a Canadian port.

Should a carrier be require to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. We support reducing federal regulation and imposing it only in those situations where there is no effective competition. We believe that the situation described above is sufficiently competitive not to require federal action. We do not believe that a tariff-filing requirement would serve any useful purpose or have any real impact on this situation. Experience under U.S. regulation has shown that a requirement to file tariffs is not an absolute deterrent to rebating.

We would like to note that two recent FMC decisions, FMC Dockets 73–38 and 73–42, dispute the concept of cargo being "naturally tributary," that is, belonging to any specific port.

Question 12. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers, and, therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. We believe that the advantages that will accrue from being put on the same competitive footing as our foreign counterparts will far outweigh any of the disadvantages which might occur.

We would like to note that section 18(b)(2) of the Shipping Act of 1916 currently forbids the implementation of new or higher rates for at least 30 days after their filing with the Federal Maritime Commission and subsequent publication. In the case of rate decreases, it allows them to take effect immediately upon filing and publication. The legislative history for this provision shows that Congress considered whether it should delay the effective date of rate decreases. It rejected such a requirement as harmful to shipper and carriers and as detrimental to U.S. foreign commerce. Specifically, these reasons were: (1) to establish specific commodity rates which are generally lower than NOS rates, and which normally are designed to meet particular competitive situations; (2) to provide the prompt action necessary to foster trade when new products are introduced; (3) to meet competition from foreign sources and to prevent loss of markets for U.S. exporters since no foreign country requires advance notice of rate reductions; and, (4) to prevent foreign competitiors from gaining advanced notification of U.S. rate changes so that they will have the opportunity to obtain even lower rates, thus, impairing U.S. exporters' ability to compete in world markets. See the hearing record for H.R. 4229, 87th Congress, First Section.

Question 13. (A) In your view, does the Shipping Act now permit the FMC to authorize "contract carriage" agreements, such as time/volume discount?

(B) If "contract carriage" agreements are to be permitted, should they have certain safeguards to assure they are available to all shippers who are similarly situated? What should those safeguards be?

Answer. (A) We do believe that the Federal Maritime Commission now possesses the authority to allow common carriers to contract with shippers. However, since there is some ambiguity about this issue, we would like this authority reaffirmed in the statute. This ambiguity has a chilling effect on carriers' willingness to use this innovative and competitive service device. A similar situation occurred in the domestic rail industry; it was not until after Congress reaffirmed in legislation the carriers' ability to use this innovative device that they aggressively sought to these service tools to the benefit of both shippers and carriers.

(B) Our members' experience with domestic rail contracts has been very successful. We recommend safeguards similar to those imposed in section 208 of the Staggers Rail Act of 1980 (Public Law 96-448). We believe that these safeguards provide protection against undue discrimination while, at the same time, preserving sufficient confidentiality to make them a very successful means of meeting service needs.

Question 14. Those who support closed conferences maintain that conference rates are not kept artificially high because, if they were, independents would be attracted to the trade, and the conferences don't want that. Would you please comment?

Answer. We believe that conference rates can be artificially high since they must meet the revenue needs of their least efficient number. Conferences tend to support the status quo and are much more resistant to innvoations that carriers in more competitive situations. For example, intermodal container service was an innovation developed with the U.S.'s open conference system in an area not employing loyalty contracts. Only after this innovation was proven successful in this country did closed conferences institute in in their trades.

Question 15. (A) Would "contract carriage" agreements be exempt from the antitrust laws under S. 1593 and S. 125?

(B) If not, should they be?

Answer. (A) We believe that this activity, as proposed by the League, would not be contrary to the antitrust laws and that there is no need for an exemption from them. We would like to note that contracting is allowed today in certain maritime trades and is carried on in the domestic surface transportation industries, in both cases, without antitrust immunity.

(B) We have further elaborated on this matter in our answer to question 13.

Question 16. A few years ago, a study done by the Department of Justice recommended open conferences and statutorily mandate right of independent action.

This recommendation, I should note, was made by the department after it concluded it would not be politically feasible to recommend the abolition of the conference system. In other words, independent action was the next best thing.

Would you please comment on the following testimony why mandatory independent action is not desirable:

"If anything, it would seriously inhibit development and maintenance of an efficient, innovative, and economically sound ocean transportation system. Independent rate action between member carriers of a conference is totally destructive of the fundamental prinicples of liner conferences. . . . Independent rate action does not only put a conference at risk but also potentially prejudices the interests of small shippers, as it is evident that the so-called independent rate action device will favor shippers who control large blocks of cargo; triggering the mechanism would be tantamount to legalizing unofficial rebating."

Answer. We represent shippers of all sizes, small, medium, and large. The experiences of our members show that when supply is controlled, one of the first parties to be disadvantaged is the smaller importer or exporter not only because the available shipping space has been reduced, but also because carriers have less incentive to develop the innovative services needed by all segments of the shipping community. We believe that large carriers' argument about the benefits that closed conferences would bring to small shippers are specious and are made without any understanding of these shippers' service needs and requirements.

The quote appears to be designed to support the argument favoring the concept that conferences offer stability. Taken a step further, this argument would find that maximum rate stability is achieved when traffic in a trade is brought to a complete halt. Independent action is a moderating force against this tendency.

Question 17. Since you were opposed to closed conferences, I take it you would not agree with the following analysis by Dr. John Roberts in support of closed conferences:

"Indeed, there is a strong case to be made that if the choice is between a system of cartels (conferences) or one of closed cartels, the latter may be preferable, even though structually it departs from the competitive idea. The reason for this is that the closed cartel may be able to achieve lower costs than would an open one, and even if these are not passed through as lower prices, less waste is still desirable. Thus, if 'co-operatively organized and appropriately rationalized' through capacity controls and pooling agreements, the closed conference can be expected to achieve something like minimum costs for the level of service it provides."

For the record, would you please comment on Dr. Roberts' conclusion?

Answer. Indeed, we do not agree with this portion of Dr. Roberts' conclusion. It ignores, as we have stated above, the fact that conferences must gear their revenue needs to include their least efficient members. In addition, the freedom from competition reduces their incentive to develop the innovative and competitive services needed by U.S. shippers and receivers in their efforts to improve our country's ability to compete abroad. According to this argument, a one carrier monopoly or nationalization would achieve minimum cost. However, like the proposed legislation, we believe that the marketplace is the best method for achieving minimum cost.

We would like to note that Dr. Roberts' remarks are taken out of context. We would like to add for the record the two sentences which were part of the comments quoted above: "(Note, however, that this level of service is likely to be inappropriate since such a cartel is likely to raise prices.) The constraint that might be most likely to prevent the full realization of minimum cost would be the unwillingness of high marginal cost operators to be closed down by the cartel, even in return for a share of cartel profits." Several of subsidized U.S. flag carriers would probably meet Dr. Roberts' definition of "high marginal cost operators." One possible consequence of introducing a truly closed conference, as suggested by Dr. Roberts, might very well be the disappearance of several U.S. flag carriers.

Question 18. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conferences. In many cases, however, the FMC has still approved them under its section 15 authority, and they have thus received immunity from the antitrust laws.

Should this continue to be the case?

Answer. We believe that Senator Gorton best answered this question when, in introducing S. 1593, he said, "At the bill's core is a grant of complete antitrust immunity to conference activities. This is not only consistent with international shipping practice but would also remove a constant irritant between the United States and our foreign trading partners. It would restore the pre-*Carnation* case view that agreements for economic cooperation among carriers are considered to be subject exclusively to the Shipping Act, and not to other antitrust laws.

"A full application of this clarification requires an understanding of the chilling effect that antitruct laws have had on international liner shipping operations. Application of the antitrust laws has brought uncertainty to many operator decisions. Because they are subject to criminal penalties and treble damages they are often afraid of their own shadow. They are reluctant to cooperate in ways that would be protected even by the limited antitrust exemption offered by the FMC for fear that the margins of the exemption are unclear and that the Justice Department might attack them.

"In short, they are afraid to act in exactly the manner that the Shipping Act contemplates that they should be able to act."

DETAILED COMMENTS OF RALPH N. THAYER, CHAIRMAN OF THE WATER FREIGHT TRANSPORTATION-MARITIME COMMITTEE OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE ON S. 1593, SHIPPING ACT OF 1981 AND S. 125, OCEAN SHIPPING ACT OF 1980

GENERAL PRELIMINARY REMARKS

Federal economic regulation of maritime liner common carriers needs to be reviewed and updated. The basic statute, the Shipping Act of 1916, has been subjected to a number of technical amendments. The League commends the subcommittee for attempting an overall revamping of the statute.

SECTION 3—DEFINITIONS

Paragraph 3(B) reflects language from last year's omnibus maritime reform bill and is an expansion of the softwood lumber exemption presently contained in section 18 of the 1916 Shipping Act. Section 18 has a long legislative history and reflects the special transportation circumstances prevailing in that industry for many years. At present specialized vessels are being used to serve to the needs of that trade. It would be desirable to broaden this definition to other related forest products in light of changing commerical considerations.

Paragraph 12, which defines an ocean common carrier, should be amended to read "between ports of the United States and a foreign country." This change would clearly indicate that the U.S. is not extending its jurisdiction for economic regulation to contiguous or non-contiguous foreign countries.

SECTION 4—AUTHORIZED ACTIVITY

League members firmly oppose closing carrier conferences because of the pressures such an action would have toward inflexible pricing and service fixing, pooling of earnings, service constraints, and other working arrangements which prevent the operation of the marketplace's natural forces.

League members are concerned that paragraph (a)(4), for example, would invite conferences to limit or regulate the volume of cargo carried. Presumably, such a limitation would be applied on a per carrier and even per vessel basis. Cargo shutout will have an adverse impact on the U.S.'s balance of payments and on domestic employment opportunities. A "ripple effect" will occur if the carrier or vessel shut out of a trade happens to be one bearing a U.S. flag. We can easily foresee that a separate bureaucracy might be created to decide which shippers' cargo will be shut out in every given circumstance.

This section seems to be contradictory to section 2, paragraphs 2 and 3, which purports to foster reliable service by ocean common carriers and conferences and to assure ocean transportation service which are not unjustly discriminatory for U.S. exporters.

League members largely support paragraph (b), affecting intermodal activity. Clear antitrust immunity to construct and publish intermodal tariffs is needed. A large share of liner cargo originates from inland points or with multi-plant shippers and receivers. The combination of intermodal routes is, in many cases, multi-faceted and in continuous flux due to changing markets and to service innovations resulting from the reform legislation passed last year for the domestic rail and trucking industries.

However, League members do not want any conference loyalty contracts to be extended to the inland portions of these movements. Conference loyalty contracts in the foreign-to-foreign trades do not do so, and we see no commercial reason for allowing this to occur in the United States. Conference loyalty contracts may be necessary, but the conferences, by their nature, tend to favor the status quo. U.S.-flag carriers are leaders in the intermodal area and would be stifled if their loyalty contracts were extended to the inland portions of these movements.

In short, carriers and conferences should have the necessary antitrust immunity to construct intermodal rates and services, and loyalty contracts should cover only the port-to-port portion of these arrangements.

SECTION 5—AGREEMENTS

League members strongly support the right of independent action in all conference agreements. We believe that paragraph (c)(4) would be the best vehicle for achieving this goal. We believe that independent actions on rate reductions should become effective upon filing and publication. The imposition of long notice periods, for example, 10, 15, 30, or 60 days, is, I believe, counterproductive since any delay beyond 48 hours renders this service device meaningless.

SECTION 6—ACTION ON AGREEMENTS

League members support expediting the approval process for agreements since prompt action enables shippers and carriers to respond quickly to changing market conditions.

SECTION 7—LOYALTY CONTRACTS

This section would replace section 14(b) of the 1916 Shipping Act, which has a detailed legislative and regulatory history (see Public Law 87-346 and FMC Docket 1111). The result of enactment and implementation of 14(b) was a uniform contract for all U.S. conferences. It brought order out of a previously chaotic situation in which contract language varied widely from conference to conference—even identical contract language was interpreted differently by each conference. The result of this confusion was that shippers were forced to work with a great deal of uncertainty.

This section of the proposed legislation would require shippers to return to this world of uncertainty that would be resolved only after lengthy FMC and legal proceedings. It also would give conferences a blank check to experiment with contract forms and requirements.

If this section is part of any final reform proposal, I believe that antitrust immunity for consultation among shippers, carriers, and conferences to discuss this and other related matters must be clearly stated. Many League members would prefer that 14(b) be retained because of its highly beneficial effects. They believe that if contracts need to be amended, it should be done objectively on a case-by-case basis. Shippers definitely fear a wholesale scrapping of loyalty contracts, particularly where shippers may not jointly present views to conferences (see League September 23 testimony on shippers councils).

Paragraph 3(B) invites rates to fluctuate like a yo-yo every 30 days within a six-month period. One of the major advantages of the ocean conference system is rate stability. This section would destroy any need for this system because it disrupts the relationships between supplier and customer. I believe that yo-yoing rates could be interpreted as unjustly discriminatory, depending on who operates the strings of the yo-yo, and question the commercial need for this statutory language. I would note that shippers may well be reluctant to sign a loyalty contract containing such language. The result of this reluctance might be the destruction of the conference system because the prospect of rate stability would have been legislated out of existence.

The last sentence of paragraph 4 turns the clock back prior to 1961. Shippers outside the U.S. have approached the issue differently. Under an agreement between the European Shippers Council and the Committee of European National Shipowners Associations signed in November 1973 in Hamburg, Germany, shippers and carriers agreed to Recommendation 15, which deals with FOB/FAS and Ex Works shipments. This agreement reflects a situation similar to that now existing in the U.S.

The text of that agreement states, in part:

I. Treatment of FOB/FAS/Ex Works Shipments—Preamble

European Shippers' Councils and CENSA agree that where shippers sign a loyalty contract they should in return for immediate discounts or contract rates give the conference concerned their maximum support without evasion or subterfuge.

It is, however, recognized that under terms of certain contracts of sale shippers may not be entitled and/or able to determine the method and means of shipment of goods sold and in such circumstances should be released from their obligations under the loyalty contract in respect of such shipments.

Recommendations:

In order to implement the above principles it is recommended as follows:

1. Any provision in a loyalty contract which defines the scope of a shipper's loyalty in a way that any and every shipment originating from a signatory is covered by a contract, shall be qualified by a statement to the effect that the shipper, as principal or as agent, shall be released from his obligation under his contract whenever he or his agent is not entitled and/or able to determine the method and means of shipment.

2. In casvs where a shipper, who is not entitled and/or able to determine the method and means of shipment, is obliged by his buyer to act in a manner which could be construed as a breach of contract, he shall in order to be released advise a conference representative of the circumstances as soon as he can and whenever practicable prior to shipment.

(Note: Failure to "advise" shall not in itself constitute a breach of contract. However, in such an event no automatic release is grated and until "advise" is given to a conference representative, the conference is entitled to proceed on the basis that there has been a breach of contract.)

3. The shipper's advise to a conference representative referred to in (2) above shall consist of information sufficient to identify the shipment and whenever possible, and to the extent permissible in national legislation, the person controlling the method and means of shipment.

4. Where under a contract of sale a person other than the shipper exercises a right to determine the method and means of shipment the shipper is urged to advise that person of any loyalty contract he has signed and to invite that person to ship on a conference vessel.

Implementation:

Any amendment to shippers' loyalty contracts in order to implement the principles stated above will be subject to consultation in accordance with Joint Recommendation No. 15.

Recommendation 15 was reached commercially and without government involvement. Paragraph 4 of the proposed bill would place U.S. importers and exporters in an impossible competitive "straight jacket" without, I believe, any sound explanation of why this radical change is necessary.

Paragraph 8 needs clarifications since it raises the possibility that shippers would be unable to continue the current practice of "opening" rates. Shippers strongly support being able to make use of this service device which is formulated in FMC Docket No. 1111.

Paragraph 9 also needs clarification since its wording "a series of spreads" raises the possibility that the old triple rate system could be revived, This system was disallowed by the FMC in the North Atlantic/Portugal Conference and has been discontinued by the Japan/Homeward, Mediterranean/East Canada, and Brazil/Japan conferences. Those conferences discontinued this system because it was a dismal commercial failure. I believe clarification is necessary to ensure that the impractical transportation scheme is not inadvertantly resurrected.

SECTION 10—CONTROLLED CARRIERS

The League opposed enactment of this legislation and still believes that the politically motivated and destructive activities of certain national carriers should be dealt with on a case-by-case basis by the countries directly involved either through diplomatic channels or through treaties. Generally addressing this issue through legislation unnecessarily has injected politics into a commercial activity. The difficulties of defining a controlled carrier has inadvertently hurt some truly commercial carriers which are providing innovative services on U.S. trade routes, for example, Neptune Orient and Polish Ocean Lines, to name a few.

This legislation also has implications for subsidized U.S.-flag carriers since they could be considered to meet the definition of a controlled carrier if some other nation enacted similar legislation.

SECTION 11—OCEAN FREIGHT FORWARDERS AND NON-VESSEL OPERATING COMMON CARRIERS

The League believes that NVOCCs should be required to furnish a bond and that an amount of $150,000 appears reasonable. As for freight forwarders, a bond of $50,000 plus a bond of $25,000 for each forwarder branch office, not to exceed a total of $150,000, also appears reasonable.

Paragraph (c) needs clarification to assure that shippers retrain the discretionary right, allowed under current law, to make their own bookings and prepare some of the necessary documentation. This could be accomplished by (1) changing in line 7 the word "shall" to "may"; (2) inserting in line 11 the words "any of" between the words "performed" and "the"; and, (3) eliminating in line 15 the word "and".

SECTION 12—PROHIBITIVE ACTS

Paragraph 3 needs clarification to eliminate the confusion of some shippers as to whether they would be able to negotiate a rate lower than the published one. I doubt whether the legislation is intended to prohibit this competitive practice and seek the change to ensure that current right is continued.

Senator GORTON. Our next witness is Mr. Charles Kiskaddon, Chairman, United States Council of the International Chamber of Commerce.

STATEMENT OF CHARLES G. KISKADDON, JR., CHAIRMAN, UNITED STATES COUNCIL OF THE INTERNATIONAL CHAMBER OF COMMERCE, AND PRESIDENT OF ALCOA STEAMSHIP CO., ACCOMPANIED BY PETER FINNERTY, VICE PRESIDENT, PUBLIC AFFAIRS, SEA-LAND INDUSTRIES; AND JOHN BAISLEY, DIRECTOR OF LOGISTIC COMPONENT OPERATIONS, GENERAL MOTORS CORP.

Mr. KISKADDON. Good morning, Mr. Chairman and members of the subcommittee. I'm Charles Kiskaddon, president of Alcoa Steamship Co., and I am here today as chairman of the Sea Transportation Committee of the United States Council of the International Chamber of Commerce. With me are two other members of this committee: Mr. Peter Finnerty, vice president of public affairs for Sea-Land industries, Inc.; and Mr. John Baisley, director of logistic component operations for the General Motors Corp.

Let me just make a couple of comments about the United States Council. It is the U.S. national affiliate of the International Chamber of Commerce, which is a world business organization. The United States Council represents U.S. international business from all sectors, including over 220 corporations, on numerous issues affecting our ability to effectively compete abroad. It is the major U.S. business association that concentrates solely on the international marketplace.

The Council's Sea Transportation Committee, which is here today, represents both suppliers and users of transport services, and, as you'd expect, we are acutely aware of the crucial role of transportation to the American business community and of the extensive use which is made of a wide range of services presently provided by the international ocean liner transport system.

With your permission, Mr. Chairman, I'd like to ask Mr. Finnerty to speak to our committee's specific policy recommendations on S. 1593.

Senator GORTON. Go ahead.

Mr. FINNERTY. Mr. Chairman, S. 1593 represents a most extensive reform of liner shipping regulation and U.S. foreign commerce. It contains important and overdue improvements, but certain aspects of the bill could be counterproductive and we believe should be changed.

The bill proposes a strengthening of the antitrust exemption. While the United States Council favors competition, it agrees with the prevailing international view that ocean shipping operates in an extraterritorial environment that is international in nature. Therefore, we support the section 8 exemption and agree that the shipping act should supercede the domestic antitrust laws for liner shipping in U.S. foreign commerce.

The United States Council believes that the forces of supply and demand, acting to the greatest extent possible through open access, free market mechanisms should be encouraged. In this vein, we believe that there is a need to move toward an even more open and market responsive market shipping system than presently exists. The authority to close conferences, as included in this bill, would, in our view, be a step backward. We believe strongly that the open conference system in the United States must be preserved. This type of arrangement provides a maximum flexibility needed to foster international trade by being the most responsive system to the needs of the carrier, the shipper, and the consumer. The open conference system has resulted in the establishment of American lines as the best lines in the world. It has also greatly aided innovation.

It is true that the U.S.-flag shipping industry is facing tough problems for a variety of reasons. In order to overcome these difficulties, we must insure at least that the possibility of innovation is maximized. The major handicap to healthy functioning of the open conference system has been the inadequate antitrust law exemption, which S. 1593 remedies in section 8.

The United States Council believes that an assured right of independent action by individual conference members on tariff matters after due notice to other members, would be beneficial to the conference system. This is not only important to carriers, but to shippers as well, particularly in developing markets. A shipper cannot always provide a large enough volume of business to attract a majority vote of conference members. The volume may, however, represent an attractive business opportunity for one or two member carriers.

A prudent right of independent action after the conference has had its opportunity represents the best assurance of responsiveness by the marketplace. Carriers should be free of the threat of economic reprisal and the disruption of resigning from conferences in order to exercise healthy business judgment.

The bill would provide the authority to establish shipper councils with extensive authority, but this does not adequately address how shippers' councils would be structured. We are fearful that the notion of shippers' councils is primarily being used here in hopes of a counterbalance to closed conferences, thus legitimating the latter. However, we have seen little evidence of shippers' councils outside the United States being able to truly counterbalance closed conferences, and would caution against the assumption that establishing shippers' councils with antitrust immunity automatically constitutes an effective equalizing force.

We would suggest that shippers' councils are not needed if conferences are required to retain open access and operate under responsive market circumstances.

In conclusion, Mr. Chairman, the United States Council wishes to express its support of S. 1593, if the changes described previously are adopted. We would be pleased to respond to any questions. Thank you.

Senator GORTON. Thank you. In the North Atlantic trades where the conference does grant a right of independent action, has that been adequate?

Mr. FINNERTY. I think it has been very beneficial, Mr. Chairman. And while it has varied in different locations, different conferences in the Atlantic trades, it has proved very beneficial during the difficult times of the last year or so.

Senator GORTON. What do you mean by beneficial?

Mr. FINNERTY. Beneficial in that it has permitted the members of the conference, short of resignation and disbanding, to react to the needs of the marketplace and the particular needs of the shippers in attempting for the conference to compete against outsider competition.

Senator GORTON. That is to say it is enhanced competition?

Mr. FINNERTY. That is correct.

Senator GORTON. Would a closed conference be acceptable if revenue pools were forbidden?

Mr. FINNERTY. Our organization's position is that we would be opposed to closed conferences under any circumstances, and we have a strong preference for open conferences.

Senator GORTON. That's only partly responsive to the question. Would forbidding revenue pools at least ameliorate your objections?

Mr. FINNERTY. I would think not, Mr. Chairman.

Senator GORTON. How about a requirement in a closed conference that it must provide each member the right of independent action?

Mr. FINNERTY. We would be in favor of such a provision.

Senator GORTON. As I asked the last witness, isn't it necessary to concede that independent action would disrupt the conference's ability to rationalize and preclude the consequent benefits of rationalized services?

Mr. FINNERTY. I think not, Mr. Chairman. I think under the open conference system with an adequate antitrust exemption authority to be vested in the Federal Maritime Commission as the bill proposes, a considerable degree of rationalization could take place which has been prevented in years past because of the difficulties with the antitrust immunities, especially for U.S. carriers.

Senator GORTON. Why shouldn't we leave it to negotiations among the members of any given conferences, influenced by their shippers to determine whether independent action is appropriate in the trade which they serve?

Mr. FINNERTY. That is a difficulty that has so far proven—that is to say, the voluntary basis—to be unsatisfactory in certain trades where dominant foreign-flag interests have created a voting block which has prevented independent action from being implemented.

Senator GORTON. Can you give some examples?

Mr. FINNERTY. The Pacific trade and the conferences dealing with Japan.

Senator GORTON. Where the right of independent action is required, how much notice should be appropriate before exercising the right?

Mr. FINNERTY. This organization has not taken a position on a specific number of days, Mr. Chairman, other than to agree that it should be a prudent period of time such as to minimize any potential disruption.

Senator GORTON. Should a time be included in the statute or simply subject to the power of the FMC?

Mr. FINNERTY. I think the time should be included in the statute, or at least a maximum period of time.

Senator GORTON. Then we're going to have to have some suggestions as to what that maximum should be.

Mr. FINNERTY. Yes, sir.

Senator GORTON. Do you believe that with the antitrust issues clarified by S. 1593, open conferences could operate as efficiently in U.S. trades as closed conferences do elsewhere, or more so?

Mr. FINNERTY. I would say that with the provisons contained in the bill, there would be an enormous increase in the efficiency of the open conference system in the U.S. trades. Whether it would be as efficient as closed conferences elsewhere depends, I think, upon factors that go beyond the four corners of the bill, or indeed the shipping act.

Senator GORTON. And what kind of considerations are those?

Mr. FINNERTY. Well, having to do with maritime nationalism and features that go beyond simple supply-and-demand forces.

Senator GORTON. Finally, you suggested shippers' councils are not necessary where the government, by regulation, requires all conferences to maintain open membership and permit independent action. You are concerned that shippers' councils are not an adequate mechanism to protect shippers from the unregulated conference structure permitted by the bills as now drafted. Why do you believe shippers' councils will be impotent under those circumstances? Isn't there great faith in such councils in Europe?

Mr. FINNERTY. Again, the body of membership of the council is of the collective opinion that the shipper councils would not be an adequate counterbalance to closed conferences. I imagine that the specifics as to why would range over many different points, because the organization does have a broadly representative membership. But the basic feeling is that the consultation authority that would be granted to shipper councils would not, in general, be a sufficient counterbalance to the very strong power that the closed conference would seem to be given in the bill.

[The statement follows:]

STATEMENT OF THE UNITED STATES COUNCIL OF THE INTERNATIONAL CHAMBER OF COMMERCE

Mr. Chairman, I am Charles G. Kiskaddon, Jr., President of Alcoa Steamship Co. and Chairman of the Sea Transportation Committee of the United States Council of the International Chamber of Commerce. With me are two other members of this Committee: Peter Finnerty, Vice President, Public Affairs of Sea-Land Industries, Inc. and one of the Committee's three Vice-Chairmen; and John Baisley, Director of GM Logistics Component Operations.

We are pleased, on behalf of the United States Council, to be here today to support your efforts to improve the position and profitability of the U.S. liner shipping marketplace.

The United States Council is the U.S. national affiliate of the International Chamber of Commerce, the world business organization with similar councils in over 50 countries. There are direct members in over 40 countries where no national committee has yet been formed. This includes most of the other twenty-three member countries of the Organization for Economic Cooperation and Development (OECD) and a broad range of developing countries throughout Africa, Asia, and Latin America. The United States Council represents the interests of U.S. international business from all sectors, including over 220 corporations and banks, on numberous issues affecting our ability to effectively complete abroad. It is the major U.S. business association that concentrates solely on the international marketplace.

The Council's Sea Transportation Committee is a group that represents both suppliers and users of transport services. It provides a forum for various interests in the maritime transport industry to reach a common position on issues of mutual concern.

We are acutely aware of the crucial role of transportation to the American business community; and of the extensive use which is made of a wide range of services presently provided by the international ocean liner transport system. The United States Council therefore has a compelling interest in the maintenance of the efficiency and long-term economic health of international ocean liner transport in U.S. and foreign trades, and stresses the need for continual improvement of ocean liner transport services. This matter is urgent to America's international trading position.

In general, the United States Council believes that the forces of the free market economy and open competition best serve the interests not only of international industry and its customers but the community at large. Likewise, the United States Council believes that the international ocean liner transport industry would benefit from a more open, market responsive environment. The liner shipping industry requires massive capital for investment in fleet replacement and modernization. The only long-term way in which such funds can be generated or secured is for the efficient ocean carriers, whether large or small, to make adequate profits. But a healthy marketplace should be the basic judge of efficiency and, hence, ultimately profitability.

S. 1593 represents a most extensive reform of liner shipping regulation in U.S. foreign commerce. It contains important and overdue improvements, but certain aspects of the bill would be counterproductive and should be amended.

It is critical that we not lose sight of the relationship of maritime transport to U.S. international trade. While we attempt to restore health to the $16 billion per year liner shipping industry, care must be taken not to jeopardize the $180 billion per year U.S. product export industry.

ANTITRUST IMMUNITY

The bill proposes a strengthening of the exemption from U.S. antitrust laws. While the United States Council favors competition, it agrees with the prevailing international view that ocean shipping operates in an extraterritorial environment that is international in nature. Therefore, we support Section 8's exemption and agree that the Shipping Act should supersede the domestic antitrust laws for liner shipping in U.S. foreign commerce.

OPEN VERSUS CLOSED CONFERENCES

The United States Council believes that the forces of supply and demand, acting to the greatest extent possible through open access, free market mechanisms, should be encouraged. In this vein, we believe that there is a need to move towards an even more open and market responsive liner shipping system than presently exists.

The authority to close conferences, as included in this bill, would in our view be a step backward. We believe strongly that the open conference system in the U.S. must be preserved. This type of arrangement provides the maximum flexibility needed to foster international trade by being the most responsive system to the needs of the carrier, the shipper, and the consumer.

The open conference system has resulted in the establishment of American lines as the best lines in the world. It has also greatly aided innovation. It is true that the U.S.-flag shipping industry is facing tough problems, for a variety of reasons. In order to overcome these difficulties, we must ensure at least that the possibility of innovation is maximized. The major handicap to healthy function of the open conference system has been the inadequate antitrust law exemption, which S. 1953 remedies in section 8.

INDEPENDENT ACTION

The United States Council believes that an assured right of independent action by individual conference members on tariff matters after due notice to other members would be beneficial to the conference system. This is not only important to carriers, but to shippers as well, particularly in developing markets.

A shipper cannot always provide a large enough volume of business to attract a majority vote of conference members. The volume may, however, represent an attractive business opportunity for one or two member carriers. A prudent right of independent action, after the conference has had its opportunity, represents the best assurance of responsiveness by the marketplace. Carriers should be free of the threat of economic reprisal and the disruption of resigning from conferences in order to exercise healthy business judgment.

SHIPPERS COUNCILS

The bill would provide the authority to establish Shippers Councils with extensive authority, but this does not adequately address how Shippers Councils would be structured. We are fearful that the notion of Shippers Councils is primarily being used here in hopes of a counterbalance to closed conferences, thus legitimating the latter. However, we have seen little evidence of Shippers Councils outside the U.S. being able to truly counterbalance closed conferences and would caution against the assumption that establishing Shippers Councils with antitrust immunity automatically constitutes an effective equalizing force.

We would suggest that Shippers Councils are not needed if conferences are required to retain open access and operate under responsive market circumstances.

In conclusion, Mr. Chairman, The United States Council wishes to express its support of S. 1593 if the amendments described previously are adopted. We would be pleased to respond to any questions.

Thank you.

Senator GORTON. Again, I should like to thank all three of you for your participation. I am sure we will hear from you further.

Our next witnesses will be Mr. J. F. Muheim of the European National Shippers Councils.

You may proceed.

STATEMENT OF J. F. MUHEIM, FORMER CHAIRMAN OF THE STANDING COMMITTEE OF THE EUROPEAN NATIONAL SHIPPERS' COUNCILS, AND DIRECTOR, MARKET TRANSPORT SERVICES, NESTLE WORLD TRADE CORP., VEVEY, SWITZERLAND

Mr. MUHEIM. Mr. Chairman, members of the subcommittee, my name is Hans Muheim, and I will be speaking on behalf of the European National Shippers' Councils, of which I am presently a member of the standing committee, which is the executive body, and was its chairman from 1976 to 1980. I am also chairman of the Swiss Shippers' Council since 1965.

In these capacities, I have been interested in European and worldwide transport and shipping policy for many years. I have been a member of the Swiss delegation to diplomatic conferences dealing with the United Nations Convention on a Code of Conduct for Liner Conferences and with the Hamburg Convention on Carriage of Goods by the Sea.

The European National Shippers' Councils [ESC] wish to demonstrate by their testimony the great importance U.S. shipping policy and legislation has for shipping activities of your Nation's trading partners.

Ocean transportation being the most important vehicle of international trade and the United States being the foremost trading nation and the leading market economy country, the ESC has experienced in practice the worldwide implication of U.S. shipping legislation which frequently serves as a guide and example to many other governments when preparing their own shipping legislation. To harmonize U.S. shipping practices with those of its major trading partners is rightly one of the objectives of your bill.

The ESC hopes that this presentation will assist your committee in its highly appreciated endeavor to revise the regulation of international liner shipping operating in the U.S. foreign commerce.

The ESC has submitted a formal statement for inclusion in the record but, summarizing, I would like to highlight a few points in relation to S. 1593.

The ESC is a federation of 14 national shippers' councils in Western Europe and Israel. The ESC was formed over 18 years ago. The views in the formal statement and in this summary are based on the experience of the constituent national shippers' councils and of the members of the committees of the ESC, all of them being shipping and transportation managers in Europe and dealing in worldwide shipping.

THE CONFERENCE SYSTEM

The ESC is in favor of the conference system because of its merits and advantages for international trade of breakbulk and containerized cargo. Its cartel-like nature, however, has induced the ESC to make their support of individual conferences dependent on the latters' willingness to subject themselves to a series of restrictions and obligations which materialize mainly through consultation with shippers' councils.

American law has to date made it practically impossible for American-based conferences to fulfill that condition. Consequently, those conferences have forfeited the support of the ESC. For this reason, on the whole, the ESC welcomes the bill, since it would appear to enable American-based conferences to resume such consultation with the ESC which was discontinued many years ago.

SHIPPERS' COUNCILS

Many bodies in the world, including the United Nations, have repeatedly recognized the usefulness of shippers' councils and the need for consultation between them and conferences in preference of governmental interference and undue supervision. It must be deplored that the United States, as one of the OECD countries, still has no such councils. The ESC welcomes, therefore, that S. 1593 will make the formation of councils in the United States possible.

However, an extension of their permitted activities is desirable and some clarification of the type of councils and structures is necessary. I may add that the existence and actions of shippers' councils should not exclude direct contract negotiations or setting up of enterprise/service contracts between shippers and carriers or conferences. This type of activity is possible in Europe.

And, although time does not permit elaboration, I would like to note that some of the statements I have heard before me today evidence fundamental misunderstandings about the function and role of a shippers' council; apparently, it is not quite understood what shippers 'councils in Europe are actually doing. In this connection, I would particularly like to draw attention to the explanatary pamphlets that are attached as exhibits to the ESC formal statement.

Finally, I think that the ESC supports the rule in your bill that freight forwarders and NUOCC's not be allowed to join shippers' councils.

LOYALTY CONTRACTS

The European Shippers' Councils believe that conferences should be allowed to operate loyalty contracts which, however, should be subject to consultation between shippers' councils on the basis of the minimum requirements as set out in your bill.

CONTROLLED CARRIERS

The European Shippers' Councils accept and understand that the bill deals with these problems, because this matter in the European Shippers' Councils' mind is one which can best be solved, if not exclusively, by governments. The European Shippers' Councils have publicly expressed this view to their governments.

THE FEDERAL MARITIME COMMISSION

The ESC welcomes the limitation of activities and authority of the Federal Maritime Commission as proposed in your bill. Moreover, they believe that the limitation should be extended to withdraw the Federal Maritime Commission's right to investigate violations of the act upon its own motion. The Federal Maritime Commission should be allowed to act only on complaints from the parties directly involved.

CLOSED CONFERENCES—RATIONALIZATION—INTERMODAL ACTIVITIES

The ESC understanding of "closed" and "open" conferences is something quite different from the U.S. definitions. However, the ESC welcomes the section in your bill that would allow limited-membership conferences, which is in line with the longstanding ESC wishes. This means that rationalization in conferences should be possible. In this connection, we would propose that if a line is refused entry to a conference, the issue be resolved by commercial arbitration or conciliation. We rather favor this instead of placing it before the Federal Maritime Commission.

EXTRATERRITORIAL APPLICATION OF THE AMERICAN ANTITRUST LEGISLATION

The ESC welcomes, above all, that the bill will hopefully terminate over a decade of extraterritorial application of American antitrust legislation, which has created an intolerable situation for exporters, importers, and shipping lines involved in the trade between the two most powerful trading partners in the world. This means the United States and Europe. However, some further clarification in the bill, particularly section 8, is desirable.

The ESC is prepared to submit further information in writing, if desired.

Thank you, Mr. Chairman.

Senator GORTON. Thank you very much.

What advantages are there in closed conferences and pooling arrangements to the shipper?

Mr. MUHEIM. We are a little bit cautious with respect to pooling systems. If they don't affect quality of the service, pools may be a legitimate means of rationalization and may not be to the detriment of shippers. To the contrary, they may benefit shippers, but one has to judge case by case. I would not make a blanket statement whether pooling is good or bad. It depends how it's operating.

Senator GORTON. Please address the question of the closed conference in that respect.

Mr. MUHEIM. Well, the closed conference—we have a feeling that completely closed conferences are, of course, detrimental to the shippers' interest. Conference should be fairly open to access, especially of national lines in reciprocal trades; in this case, the American lines. Rules and regulations should be such that the threshold for entry is not prohibitive.

Senator GORTON. At this point, I'll interrupt to welcome to the hearing, Senator Cannon. We are delighted to have you with us. We hope that you will be able to stay through the balance of the hearing.

Do revenue pools destroy the motivation to innovate, seek new business and to provide better service?

Mr. MUHEIM. This could be the case; yes. I think one has also here to be very careful, and I think shippers' councils should have a voice to see how such revenue pools are set up, how they work, and what effect they have. I think here we have to have a clear commercial judgment of how they work.

Senator GORTON. In Europe, how do shippers know what the rates are? What is the tariff publication procedure there? Or does it vary from country to country?

Mr. MUHEIM. Well, the second joint recommendation between the ESC and CENSA under our consultation process was that there should be reasonable availability of tariffs. This recommendation was made in 1966, and it's quite clear that tariffs have to be available to the individual shipper, either in the secretariats of conferences or in the offices of the shippers or shippers' councils. They have to be public without necessarily making a formal filing, because in Europe conferences would have to file with 14 different governments. That would be quite difficult.

Senator GORTON. Are small shippers disadvantaged there, as they don't have the cargo leverage to negotiate preferential bookings based on volume?

Mr. MUHEIM. Yes. I think small shippers, have from time to time, difficulties, and it's especially the task of shippers' councils to help them to know what conditions are in the market. We do that regularly by circulars to our shippers, tell them what special contracts are available and whatever other advantages you can have. I think this is the informative tasks of shippers' councils.

Senator GORTON. How do you deal with problems of discrimination? Does the council get involved?

Mr. MUHEIM. I have known in my almost 20 years activities in shippers' councils about very few cases of discrimination. If shippers' councils hear about it they will, of course, approach the respective conferences and, if necessary, the respective supervisory authority of the respective government.

Senator GORTON. How do the European conferences police adherence to the conferences on tariffs?

Mr. MUHEIM. Usually they have a neutral body with some inspection rights. And this is done without specific governmental supervision.

Senator GORTON. Does the lack of a mandatory tariff filing give outsiders an undue advantage over conference carriers in cutting special rate deals, because conferences may not know what the outsiders tariffs are?

Mr. MUHEIM. I think conferences know very well what the rates of independent operators are, and I think, again under the circumstances in Europe, it is quite open and transparent what the specific rates are. There are very few exceptions where a shipper or a conference doesn't know what an independent is doing.

Senator GORTON. Do the national shippers' conference or the ESC deal with independents, as well as conferences?

Mr. MUHEIM. Yes. The Liner Committee of the ESC deals with important well-established independents, and so do individual councils.

Senator GORTON. Does the ESC deal with shippers at the other end of its trade routes?

Mr. MUHEIM. We do, as councils have contracts with a number of shippers' councils at the other end of the trade routes to exchange information about policies and even educational schemes.

Senator GORTON. You apparently believe that shippers' councils organized along commodity lines would not best serve the interests of shippers generally. Would you please explain why not, and describe the organization of shippers' councils in Europe and the advantage they have over commodity-oriented councils?

Mr. MUHEIM. Commodity-oriented councils or groups have a tendency to look only at their particular interest. This is their right, and it is also their reason. On the other hand, the shippers' councils, as such, is a body to protect the interests of shippers in general. This is also the reason why we don't get involved in individual rates or individual contracts in the individual business of the shipper. We try to protect the overall interests of shippers on a different level. I think we can do this much better than commodity councils. This is also the opinion, by the way, of the Australian Shippers' Council, which has to deal with the general interests of shippers despite very strong commodity groups, sometimes against some partisan interests of the respective commodity groups.

Senator GORTON. Would you advise us to mandate the organization of such councils in our legislation?

Mr. MUHEIM. I don't quite understand what you mean by mandate.

Senator GORTON. Would you say we should prohibit commodity-oriented councils in our legislation?

Mr. MUHEIM. No, I don't think so. I think they could be part of a regional or overall shipper council structure. They already exist, some of them, and they could very well fit in as specialized groups of the respective shippers' council.

Senator GORTON. But should our law mandate this kind of organization or simply leave it to the market?

Mr. MUHEIM. I think it should be left to the market.

Senator GORTON. The strong regulatory role of the Federal Maritime Commission to investigate on its motion violations of the act, such as the tariff adherence requirements, have been justified in a number of areas as necessary to protect shippers. But you advocate further limitations on the Commission's authority. Obviously, you have great faith in the shipper's ability to fare well in the commercial resolution of disputes.

Does S. 1593 create the kind of environment in which this ability will exist in U.S. shippers?

Mr. MUHEIM. I think I said in my introduction that the scope of authorized activity by a shippers' council should be much larger, not only directed as a countervailing power to that of conferences. They should have more rights and obligations to protect the interests of shippers.

On the other hand, the Federal Maritime Commission should have limited powers. For instance, commercial resolution of disputes should be tried first, and a shipper's council could then appeal to the FMC if consultation doesn't work, or if some discrimination is going on, but only as a last resort, This is more or less the situation we have in Europe, where we can appeal to the respective government body in really grave cases. Because otherwise, I think, especially in the more commercial environment, as is expected to come about, if I have heard my shipper colleagues in the States correctly, I think the shippers can very well look after their commercial interests individually on the one hand and collectively through the council(s) on the other.

Senator GORTON. Have the European Shippers' Councils had any particular difficulty in the North Atlantic trades with the United States, as a result of our antitrust laws which would be cured by this bill?

Mr. MUHEIM. Yes. We have practically given up consultation with the respective conferences, because it is just not consultation as we understand it, just a listen-and-report activity without proper commercial reaction by the conferences. We have been very unhappy for many years with these conferences, and we really cannot support this type of open conference, which cannot properly deal with the demands of shippers' councils.

Senator GORTON. What are the major issues that shippers' councils and conferences generally confer about?

Mr. MUHEIM. Well, the emphasis may change from time to time as commercial needs change as well. Right now we, for instance, are very strongly talking to conferences about the impact of surcharges on the rate level and rate structure all over, not for individual commodities but generally. And we try to talk to conferences aiming at some understanding for more market-oriented rate structures; the type of classes, for instance, the difference between the lowest classes and higher classes, all these commercial issues. Because we would like, of course, that the conference will be carrying low-paying and middle- and higher-paying cargo in one basket. And for this they need to adjust the rates or to simplify the tariffs.

The second important point we are dealing with right now is the simplification of freight bills. Each conference thinks they have invented the wheel and they each have a different system of compiling these bills, which in the end makes control of the carrier bills or precalculation of rates completely impossible and the use of a computerized system very difficult. This is the reason why we want to save administrative costs for shippers, but also for the shipping companies.

Senator GORTON. In what ways could dual rate contracts be strengthened, and should they be? Is there any magic to the 15 percent spread? Greater? Less?

Mr. MUHEIM. I think the minimum requirements in your bill are quite stringent enough. They are acceptable to ESC. We still would like to put some meat on the skeleton of the minimum requirements.

About the spread, well, if the rates, due to the rationalization of conferences, are reasonable and not too high, I think a spread of 10 percent is probably the right thing, and 15 percent may indicate that there is a lot of juice still in the conference rates that can be given away.

Senator GORTON. What advantages, if any, do you see in the existence of NVOCC's?

Mr. MUHEIM. Not much.

I think they do a business without really having the courage to invest in an activity.

Senator GORTON. Can freight forwarders do the job just as effectively?

Mr. MUHEIM. Yes. I think, for instance, groupage activity, groupage containers, let's say, from Cincinnati to Basle in Switzerland. A freight forwarder can do this just as well, in cooperation with the shipping companies.

Senator GORTON. S. 1593 proposed to eliminate regulation of U.S. freight forwarders, except for a bonding requirement and a prohibition on brokerage where they have a beneficial interest in the shipment. Will this put U.S. freight forwarders pretty much on the same footing as European freight forwarders?

Mr. MUHEIM. Roughly, yes. I think also we have no specific regulation in Europe. They have to register their business activity, how much capital they have and so forth. In a trade or commerce registration there is no specific requirement to justify their professional capacity whatsoever. The freight shipper is at his peril to find out. What we have in Europe is that some shippers, especially large companies, have their own forwarding company that obtains, as they do perform a documentation job for the carrier, maybe a 2 or 2½ percent commission. For other activities they are paid by the shipper, by the exporter. So to some degree it would be the same situation in the U.S., except perhaps for the last point I have made.

Senator GORTON. Mr. Muheim, I would like to thank you for your enlightening testimony and your candid answers to questions. We may have a few more in writing. I know Senator Inouye does and Senator Cannon may. We hope you will be willing to answer those as well.

Mr. MUHEIM. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF THE EUROPEAN NATIONAL SHIPPERS' COUNCILS

A. Introduction

1. The present statement reflects the standing policy views of the ESC, a federation of 14 national councils in Western Europe and Israel, which have existed now for 18 years.

2. The ESC views contained in this paper are based on first hand experience gained during more than 18 years by the ESC collectively and the 14 member Councils individually, i.e. by a large number of shipping and traffic managers of many major, medium and small sized exporting and importing companies in the countries of the member Councils.

3. Detailed information on the ESC, their structure and working methods, and the composition and representativity of the member Councils may be read in two booklets which are annexed to the present paper.[1]

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[1] The booklets have been retained in the committee files.

4. This is not the first time that the ESC have the opportunity and honour to submit their views to the American Congress. This was done before in 1978 on the occasion of hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries of the House of Representatives on H.R. 11422. The views then submitted and expressed by an ESC witness are contained in an official record of the 95th Congress, 2nd session, Serial number 95-47, page 230 and following.

5. The policy views then expressed are still valid and partly repeated in the present statement, adjusted to bear more specifically on S. 1593 under review now, and updated to take account of developments both in and outside the United States since 1978.

B. The Conference System

1. The ESC recognise the advantages the conference system offers to international trade, such as, inter alia: regularity of sailings; frequency of sailings; sailings to and from secondary ports which shipping lines operating in isolation would find less attractive and sometimes commercially impossible to serve; high standard of services; accommodation of commodities (low value/low rated) which shipping lines operating in isolation would also find it less attractive and sometimes commercially impossible to carry; provision of those services on a continuing basis; and relative stability of freight tariffs during longer periods together with an adequate notice of rate changes and surcharges.

2. The importance of the above advantage is often greater for smaller shippers in any given trade because large shippers in any trade are normally quite capable of securing for themselves the conditions that their trade requires. Note: the qualifications "small" and "large" of shippers do not always concur with the size of the companies. A huge company may be a very small shipper in a particular trade, a large shipper in a given trade may be a small company.

3. The support of the ESC for the conference system is valid in spite of its cartel-like nature although the latter element has induced ESC to make its support of individual conferences dependent on their readiness to subject themselves to a series of restrictions and obligations, mainly materialising through consultation procedures with the ESC. It has been ESC's experience that where conferences are severly restricted and/or regulated by national legislation, any serious attempt to consult has proved pointless, not necessarily because of any unwillingness on the part of the line/conference concerned.

4. The absence of any consultation between the ESC and American based conferences serving Europe which must be imputed to the circumstances in the preceding paragraph, makes those conferences in the eyes of the ESC unacceptable cartels. In particular, the extraterritorial implementation of American legislation and the supervision of conferences, or its extraterritorial effects on shippers and their business in Europe, and on European shipowners, are the main reasons why the ESC cannot support those conferences and why numerous shippers in Europe try to avoid using their services.

5. Consequently, the ESC welcome very much Section 8 of S. 1593 as a major step in the direction of deregulation of conferences, although the ESC do still have certain reservations or apprehensions as regards the conditions which conferences must fulfill to qualify for the exemption as spelled out in Section 5(c) (1) to (5). The ESC fear on the basis of past experience that FMC's interpretation and implementation of those conditions may give rise to unnecessary costly litigations and rejection of conference agreements by FMC. The ESC sincerely hopes that the legislation will insure that the FMC decision making process will enable conferences to be more flexible, which implies that a clarification of Section 18 and the powers of the FMC is necessary.

C. Shippers' councils

1. It would be superfluous and a waste of the Senate's valuable time to repeat the useful role and the raison d'être for shippers' councils' existence, since the following facts speak for themselves.

Shippers' councils are active now in over 50 countries among which are almost all OECD-countries;

The formation of shippers' councils has been recommended to all countries during the past decades by UNCTAD, ICC, CSG, CENSA, individual conferences in respect of the countries served by them for the obvious reason that they wish themselves to have discussion and consultation partners representative of shippers' interests;

The European Community is currently preparing a regulation for shipping conferences to exempt them from application of the competition chapter in the

Rome Treaty. The Regulations will approve Shippers' Organisations as the consultation partners of conferences;

The U.N. Convention on a Code of Conduct for Liner Conferences (the so-called UNCTAD-Code, not yet in force) mentions national shippers' councils and reserves them certain important functions and rights.

2. The ESC have always regretted publicly that there is not shippers' council in the United States, one of the most important international trading countries of the world. Its trading practices have world wide implications.

Consequently, the ESC welcome that eventually after many years the Bill S. 1593 will render the formation of shippers' councils possible in the U.S., the leading market orientated country of OECD.

3. On the basis of our experience ESC doubt wether the permitted Shippers' Councils' Activities as determined in Section 4,c, are wide enough to allow the Councils concerned to play their role in the fullest possible interest of their membership. The ESC would suggest that the permission be extended to enable the Councils to:

Consult and exchange information amongst each other, agree amongst each other upon common positions;

Consult and exchange information with non-American Councils;

Consult and negotiate with ocean common carriers or conferences regarding loyalty contracts in line with the minimum requirements as in the Bill (Section 7);

Consult and negotiate with certain third parties such as e.g. port authorities, stevedoring interests, etc., regarding charges payable by shippers (either direct or through shipping lines);

Consult and negotiate with carriers in other modes of transport in so far as they participate in intermodal services;

Consult and negotiate with conferences on general levels of freight, surcharges, tariff structures, including simplification, and rationalised freight billing; and

General consultations on services should include rationalisation and pools as they may affect both shippers and shipowners.

4. The ESC suggest clarification of Section 5 regarding the type of Shippers' Councils. As it reads now it could be interpreted as the permission to form Councils per commodity rather than Councils covering a variety of commodities on a national or regional basis. If this interpretation is correct then the Shippers' Councils so formed would in fact be commodity associations. Whilst also in Europe a limited number of (transnational) commodity associations do exist in addition to the ESC, some are members of national councils. The ESC doubt whether such associations collectively or individually could and would defend and protect the general interest of shippers opposite conferences and third parties.

5. In particular the obligation of Conferences and Shippers' Councils to cooperate in combating malpractices (Section 5 (c)(4)(B) and (d)(4)(B)) is to be welcomed and reflects one of the aims of the ESC.

D. Loyalty contracts

1. The ESC welcome the permission (in Section 7) for conferences to operate loyalty contracts which—generally speaking—conferences need to insure the long term support of the greater number of shippers, if conferences are to make investments in providing services in the long term.

2. As said in the previous chapter loayalty contracts should be allowed as a matter for consultation between (a) Council(s) and the conference concerned based on the minimum requirements as set out in the Bill.

E. Controlled carriers

1. The ESC are aware of the problem covered by Section 10 of S. 1593. In Europe the problem is better known in quarters of shippers, shipowners and governments as "non-commercial competition" by certain state controlled carriers. This is a matter of great concern to the ESC.

2. The ESC accept and understand that S. 1593 deals with the matter and the ESC have no comment to offer on the contents and substance of Section 10, this in line with the ESC view that the matter is one for Governments to deal with.

F. Ocean freight forwarders and NVOCC's

1. The ESC as a body do not represent forwarders or NVOCC's interests. In Europe freight forwarders have their own national and international associations to defend and protect their own specific interests which are not always compatible with those of genuine shippers (exporters and importers). Occasionally, where for-

warders and shippers interests are identical the ESC are ready to cooperate with forwarders associations.

2. Whilst on the basis of the above the ESC wish to refrain from commenting in detail on Section 11, the ESC welcome the clear distinction which the Bill makes between genuine shippers and forwarders/NVOCC's, and that the latter will not qualify for membership of a shippers' council. Indeed, because of the disparity of the interests of the two groups, they might harm each other if they both were represented in the same organisation.

G. Federal Martime Commission

1. The ESC have felt in the past that FMC in the execution of its difficult legal obligations has caused difficulties and excessive administrative and legal costs to shippers and shipowners both in USA and Europe.

2. The ESC wish to stress their appreciation for the limitation of FMC activities and authority which S. 1593 will entail. However, based on their own experience in Europe the ESC believe that a further reduction is desirable. The ESC are sure that the latitude for consultation broadened as suggested in paragraph C.3 of our testimony between Conferences and Shippers' Councils would further reduce the burden of FMC to the advantage of trade in general. In this context the ESC wonder whether on the same ground the filing requirement as in Section 5(b) should be reconsidered with a view to further limitation. For instance, the initiative might be withdrawn from the FMC to investigate any violation of the Act (Section 13 (c)) upon its own motion. It would be sufficient if the FMC acted on complaint from the parties directly involved only (Section 13 (a)). Shippers, shipowners and third interests are normally keen enough to file a complaint alleging a violation if the case is really worth it.

H. Closed conferences—Rationalisations—Intermodal activities

1. The ESC welcome in particular Section 4 (a) and (b) which reflects several of the wishes of the ESC regarding the type of conference and rationalisation as expressed in the ESC statement referred to in paragraph 4 of Part A.

2. A practical question in this context is how a dispute arising under Section 4(a)(7) between a conference and a rejected shipping line should be solved. This question is the more pertinent as the sentence referred to includes the possibility for a conference to expel one or more member lines (in addition to rejecting an applicant for membership). Is such a dispute to be solved through a consultation process as in Section 5(c)(5)(A)? Or does the line concerned have recourse to the FMC? The ESC favours the commercial process and this seems to be more in line with the whole tenor of the Bill which leans towards more self regulation with less governmental interference.

I. Extraterritorial application of American legislation and regulation by FMC

1. The ESC is most pleased that S. 1953 attempts to put an end to a very long period during which exporters, importers and shipping companies in Europe were held to be subject to American legislation, in particular antitrust laws.

2. The ESC concur with what Senator Gorton said in his introduction speech of the Bill in the Senate, i.e. that "our (that is of the U.S.) international trading partners" have been "simply outraged" because they "do not in any respect agree with either the extraterritorial application of our antitrust laws or with the theory of our antitrust laws as they relate to international commerce".

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR GORTON AND THE ANSWERS THERETO

Question. You state that it has been ESC's experience that where conferences are severely regulated by national legislation, any serious attempt to consult has proved pointless.

(A) Would you please explain why?

(B) Inasmuch as both S. 125 and S. 1593 provide for continued regulation of conference activity, would Shippers' Councils be able to fulfil their purpose?

Answer. (A) In trades from Europe to overseas countries where national legislation regulates conferences and where rates and conditions/contracts are filed with a government agency or sometimes even controlled and approved by it, conferences, are not free to consult in Europe with the ESC on general tariff structure, general rate increases, service rationalization, new technology, contracts, etc. They either refuse consultation or limit it in order to avoid conflicts with overseas legislation or regulation. Even European member lines of conferences in the trades between Europe and West Africa, Europe and Brezil/Argentine could not change the negative attitude of conferences which are governed by foreign legislation and regulation at the overseas end of the trade.

The situation becomes utterly intolerable where government regulation is coupled with a government imposed cargo sharing system resulting in the absence of consultation, the abolition of the free choice of vessels by shippers and the impossibility to discuss general rate levels, services and conditions. This is the worst type of cartel situation. More often than not independent lines (outsiders) are not allowed to share in the cargo allocation. Thus no competition exists.

In the Europe-U.S. traffic consultations is reduced to a "listen and report" system on advice of the conference lines' antitrust lawyers. At times not even this system works satisfactorily. This situation is in contradiction to the ESC/CENSA Code to which lines serving Europe should adhere. In this Code consultation is defined as follows:

"Consultation in the context of this Code covers all matters of mutual concern to shippers and shipowners relating to conference activities. It means timely discussion and clarification of such matters and the seeking of solutions on issues which arise between shipper organisations and conferences. The process of consultation is one where shippers and shipowners take account of each other's views and problems and strive to reach agreement consistent with their own commercial viability."

The competent United States departments and agencies were repeatedly made aware of the consequences of extraterritorial application of U.S. Antitrust Laws and government agency regulation.

(B) The reply should be divided in two:

In Europe, consultation could be resumed in accordance with the ESC/CENSA Code or—if in force—the UN Code of Conduct for Liner Conferences, if Section (8) of S. 1593 and in analogy S. 125 grants clearly exemption from the Antitrust Laws for all Shippers Council/Conference consultations and agreements concluded outside the U.S. territory (even if such consultation may deal with the Europe-U.S. trade).

Therefore some clarification to this end is needed although the ESC, operating outside the U.S., do not consider themselves subject to the extraterritorial application of U.S. Laws nor do the respective governments. ESC are responsible to their own constituents and subject to their countries' laws. However, conferences/carriers need to be exempted expressly as regards all consultations outside the U.S. territory. Otherwise no change will evolve from new legislation and consultation will remain unsatisfactory.

In the United States, Shippers' Council(s) would need more scope and freedom of action—as suggested in our testimony—to be able to act in the general interest of shippers in the consultation process. Individual shippers would need more freedom to interface with conferences and carriers on specific rates, service/project contracts and similar basic commercial matters. This should also be the case where, through equal access agreements, the position and cargo participation of U.S. carriers has to be protected because there is no really free competition. At the same time the interests of U.S. shippers (exporters and importers) should be taken care of in an appropriate manner.

In order to obtain exemption from Antitrust Laws for Conference and Shippers' Councils activities and agreements, some regulation is needed, but rather in a supervisory manner of the consultation system and to guarantee the basic commercial interplay on both levels i.e. Shippers' Councils/Conferences and Shippers/Carriers. The regulatory agency should act solely on complaint by one of the parties directly involved. In short, Shippers' Councils in the United States may be able to fulfil their purpose if the above extension of their rights coupled with full antitrust immunity is granted.

Questions of Senator Inouye and the Answers Thereto

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. Liner trades?

Answer. Experience in Europe is that no adverse consequences have occurred either for shippers or carriers, if no tariff filing with a government agency exists. As stated in the testimony, tariffs as well as conference rules and regulations (practices) must be freely available in the offices of shipping companies, their agents and shippers' councils. Individual shippers must have the right to subscribe to tariffs at reasonable costs. These requirements should in any case be part of a new U.S. Shipping Bill. In practice, the shipper may want to check with 2 or 3 conferences lines to make sure that the rates he is quoted are correct so that the tariffs in his possession are up to date. He has to do this anyway if he ships with Independent Lines each quoting its own rates. This is the system working in Europe. Filing rates in Europe with several government agencies would be too cumbersome and against normal commercial practice. No legislation relating to this exists. The Joint ESC/CENSA Recommendation No. 2 being part of the ESC/CENSA Code of Practice for Conferences is being followed by conferences and very few complaints have been registered.

Rate enforcement by the "neutral body" (cargo inspection service organized by conference) is still possible if required by law. In a more free and competitive environment as existing in Europe and hoped for by the majority of U.S. shippers, tariff filing by commercial ocean carriers seems out of place. Lines have, however, to establish up to date information systems for their customers. By the way, U.S. carriers operating in Europe have no obligation to (and therefore do not) file rates with governments of countries served by their ships. For controlled carriers, a filing obligation could still be required in the new Shipping Bill in order to monitor their rating policy.

There should be—as pointed out by ESC before—an authority or agency where shippers can submit their complaints if tariffs, rate quotations and conference/carriers rules and regulations (practices) are not made available, if advance notice of rate increases and surcharge variations is not given correctly, or if carriers discriminate between shippers. On receipt of a complaint this authority would have the obligation to investigate and, where justified, enforce remedy. In serious cases one could envisage fines to be imposed on lines by this authority.

But more important than this power of investigation on complaint vested in a government agency is the need to create a reasonable commercial arbitration system for settling disputes between individual shippers and carriers under contract of carriage (of which tariffs, rules and conditions are an integral part) and a "machinery" for the resolution of disputes between shippers' organisations and conferences (which are not in contractual relationship). I refer to the Joint ESC/CENSA Recommendation No. 17 which outlines such a system.

Again, it is relatively easy to describe a system which is an ongoing process in Europe and in all other OECD countries except the United States. It is more difficult to detect and measure the hypothetical adverse consequences of a new system which might possibly be introduced in a country such as the USA where it has never been tried in ocean shipping, at least not in modern times. It would obviously entail a change of business philosophy both on shippers' and shipowners' side and it may be difficult, therefore, to make such a drastic change in legislation.

Question. Would you please supply for the record your views on the suggestion of the National Industrial Traffic League that as an alternative to Shippers' Councils, shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

Answer. A distinction has to be made between:

(a) The Shippers' Councils' collective consultation with conferences on general rate increases, services (inclusive effect of rationalisation on shippers), surcharges and general conditions. The justification for such measures and their commercial impact on all shippers would be the subject of such consultation.

Any shippers' organisation which is properly structured and representative enough to be recognized by a conference can collectively safeguard shippers' general interest, irrespective of whether it is called a "Shippers' Council" or a "Traffic League". The question is whether the NITL in the present structure and with its present terms of reference is able to do this job. Certainly NITL is representative enough and forms a responsible nucleus. It seems that there is enough management skill and know-how to perform eventually a very good job, but an appropriate organisation and clear cut terms of reference are needed if both shippers and shipowers have to consult on a collective basis. This is clearly emerging from the European experience where the organisation of ESC and the terms of reference and working methods of committee and working parties are under constant scrutiny by the Councils.

In Europe, Shippers' Councils are not considered as cartels as they do not fix rates and conditions, cannot bind their constituents as regards shippers' commercial activities. They can only give recommendations and consult with conferences on the manifold general aspects of Liner Services. Constituents and conferences are free to follow these recommendations or not. In practice they are followed to a large degree. Thus Shippers' Councils in Europe do not need any sort of government regulation. The European Shippers' Councils are in fact "a priori" exempted from cartel supervision. The activity in the general interest is indeed completely different from conferences' colllective rate making, setting up conditions and practices, rationalization of services which are in fact limiting competition in a cartel fashion. NITL should make this marked distinction when calling for non-regulation of Shippers' Council in the United States. In fact there may be no need for it! This does not mean that Shippers' Councils may not have a reporting obligation which may be necessary in the U.S. in order to avoid collision with the antitrust laws.

(b) The consultation or rather the commercial negotiation of specific rates, contracts, etc., between individual shippers and carriers or conferences must be a basis right for each shipper or in some cases for commodity groups. No formal designation of a person or group seems necessary. This, again, is the longstanding practice in Europe and many other regions. Again these replies can only be given on the basis of the European perspective. The problem might have to be solved somewhat differently in the United States.

Question. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill. As S. 1593 provides, might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril, and they might be reluctant to take the risk?

Answer. Conferences' Loyalty Contracts limiting the freedom of the shipper to choose another carrier than a conference line is a restriction of competition. This is obviously the reason why they have to comply with the requirements in the Bill in order to be exempted from the Antitrust Laws. The shipper has however, in theory at least, the choice to enter into such a loyalty contract or not. In practice he will have to sign a contract or forego the lower contract rate. If there are independent lines giving a good service at somewhat lower than contract rates, not signing the contract may be to the advantage of the shipper. If there are no independent lines—perhaps due to cargo sharing imposed by governments at the opposite end of the trade—signing the conference contract is quasi-compulsory. As said before the ESC are in favour of the requirements in S. 1593 except for the burden of proof where the onus should be the conference's and not the shipper's. We see no "chilling" effect on shippers as long as contracts fulfill the bill's requirements. It may be different for carriers/conferences as they may have to prove that contracts meet the requirements, particularly if a shipper or a shippers' council lodges a complaint.

Senator GORTON. The next witness is Mr. Peter Ortiz of the American Importers Association.

STATEMENT OF PETER ORTIZ, AMERICAN IMPORTERS ASSOCIATION, ACCOMPANIED BY EDWIN A. ELBERT, SENIOR CONSULTANT

Mr. ORTIZ. Mr. Chairman and members of the subcommittee, my name is Peter Ortiz. I am general manager, traffic, of Hitachi Metals America, of White Plains, N.Y., and chairman of the Transportation Committee of the American Importers Association. With me today is Edwin A. Elbert, senior consultant of our association.

Since 1921 the American Importers Association has been the only national association representing importers. We have over 1,300 members, including in addition 2 importers firms who serve as the import industry, such as custom brokers, bankers and customs lawyers. We appreciate the opportunity of testifying with respect to S. 1593 and S. 125. As a number of our members are exporters as well as importers, and the legislation under consideration applies equally to both, our testimony will present both interests among our membership.

As has been the case in previous proposals to amend the Shipping Act of 1916, there still seems to be a desire to strengthen the ocean carrier conferences at the expense of the user of transportation, the exporter and importer. In the last several years, most of the proposals for amending the Shipping Act of 1916 have included the legalization of shippers' councils, and the inference is that if shippers' councils are established, they will offset the legalization of closed conferences. We do not agree with this premise. Although we are anxious to secure antitrust exemption to shippers' councils, we will not support legislation which also includes the authorization of so-called closed conferences.

It is heartening to read the objectives contained in S. 1593 and we strongly support those calling for, one, an efficient ocean transportation system with minimum Government involvement; two, fostering of reliable and responsible service by ocean carriers and conferences; and three, assuring that ocean transportation rates and practices for U.S. exporters and importers are competitive and not unjustly discriminatory. These are high sounding principles, and by themselves, no one could object to them. However, they are watered down by the objectives to harmonize U.S. shipping practices with those of its major trading partners.

The United States is the premier international trading company in the world and it's our belief that we should set the standards, rather than the other way around. Thus is stated our principal position in respect to the proposed bill.

Of a more specific nature is our concern for legalization of shippers' councils. We support the provision providing for antitrust exemption for shippers' councils, but do not believe the provisions go far enough in order to settle disputes between shippers' councils and conferences. We suggest provisions for mandatory arbitration and the requirement that conferences submit financial data to the councils when requesting increases in tariffs.

With reference to freight forwarders, the American Importers Association favors a licensing system, as well as a provision for forwarders to furnish bonds. We are, however, opposed to the establishment of a minimum bond in the amount of $150,000. We suggest that the minimum bond should be in an amount to be determined by the Federal Maritime Commission.

Our written testimony submitted earlier to this committee presents our views in more detail. We would be glad to address any questions this committee may have.

Senator GORTON. Thank you very much, Mr. Ortiz, and your entire written testimony will be included in the record of the hearing.

Mr. ELBERT. Mr. Chairman, before we go on, may I add something to this?

Senator GORTON. You certainly may.

Mr. ELBERT. With respect to S. 125, we testified at length during the hearings during 1980, and we would like that—we see no reason to change our position with respect to that proposed legislation at that time, and ask that a record of that appear and be included in the present record.

Senator GORTON. It will be so included.

You express a concern that closed conferences will eliminate competition from independents before attempting to rationalize their tonnage. Why would a closed conference be more apt to do this or more effective at doing this than an open conference?

Mr. ORTIZ. We consider international transportation as an integral component of the entire trade program. As such, a competent, functioning international transportation system will help shippers by providing better service and appropriate rates. Rationalization as proposed in this legislation is defined as pooling limitation or regulation of the volume or character of cargo and entering into other agreements by carriers to control, regulate or prevent competition among themselves. This obviously further entrenches the conference cartel system.

At issue here, as far as we're concerned, is how to measure the effect this policy has on the cost of importing or exporting our goods, and hence, the consequence to the entire economy. We must view also the benefits derived from downward pressures on rates caused by competition, but possibly of greater importance from technical improvements and the greater efficiency that competition forces carrier managers to achieve.

I think we must all ask ourselves the question: Is there something about this industry that is an exception to normal economic principles of free trade? If there is that something, I think the burden of proof as to the merits should be on those who propose it.

Senator GORTON. What would be your view of a change in S. 1593 to limit the role of shippers' councils to that of conferring with ocean liner carriers, rather than permitting actual negotiations between the two?

Mr. ORTIZ. Mr. Chairman, I think as long as we allow carriers to act collectively, we are discriminating against shippers by not allowing them to act collectively also. It's only a simple matter of fairness and equity. I also think shippers' councils could be of tremendous help to carriers in terms of planning.

Senator GORTON. How effective do you think the consultation process required by S. 1593 between shippers and carriers will be in practice?

Mr. ORTIZ. Unless there is some form of negotiation, unless there is some binding agreement between carriers and conferences, it would not be successful. We are also proponents of arbitration to resolve disputes. We think this is important.

Senator GORTON. In other words, to make it effective you would require a mandatory arbitration?

Mr. ORTIZ. That is correct, Mr. Chairman.

Senator GORTON. What is your opinion of the NIT League proposal to authorize shippers to negotiate rate and service contracts with individual carriers or conferences?

Mr. ORTIZ. It's an interesting comment. We have no position on it.

Senator GORTON. Do you believe it's necessary to continue requiring tariffs to be filed at the Maritime Commission and enforced by the Commission?

Mr. ELBERT. I don't think, really, Mr. Chairman, we have considered this position previously. We have no position on it. In general we would say that we feel that there should be some place where tariffs are open to public inspection, whether it's the Federal Maritime Commission or published in some journal that is available to the trade.

Senator GORTON. And that there should be enforcement authority?

Mr. ORTIZ. We're geared more toward the commercial arena to resolve any disputes we may have. The way it stands right now, current procedures that we have with the FMC leaves a lot to be desired for us to resolve any disputes that we might have with carriers or conferences.

Senator GORTON. Let's go on and say if the law permitted freer negotiation on rates, would there be sufficient competition so that even closed conferences would not be of concern to shippers?

Mr. ORTIZ. We are opposed to the closed conference system. We consider the closed conference a cartel. The only way we look at this is in very simple terms. This country has been laboring under the oppression of another type of cartel called OPEC. This cartel has consistently set prices according to what the market would bear. Only through competition will this cartel ever lower the prices. We see a closed conference as just strictly a cartel.

Senator GORTON. And would that be the case even if there were very strong provision for independence and independent rate negotiation? Closed conference would still have that effect even under those circumstances?

Mr. ORTIZ. We haven't viewed independent action with respect to a closed conference, because the issue would be rather academic. We're opposed to closed conferences so we never went any further.

Senator GORTON. Why do you favor licensing of freight forwarders?

Mr. ORTIZ. We believe there should be some standard. Freight forwarding does require a service to be given to shippers and we would favor knowledgeable freight forwarders that know the rules, practices and procedures.

Senator GORTON. Why shouldn't the law set a high bond for indemnity protection on their part for the benefit of shippers?

Mr. ORTIZ. I think Mr. Elbert will answer that for us.

Mr. ELBERT. I would like to go back and ask a question against your question, if I may. Do you consider the $150,000 a high bond? We don't know. It could be a million, it could be a half a million. That's why we feel that any specific amount in the bill does not serve the purpose, its real purpose, and that there should be an agency whether the FMC or some other which does establish certain minimums or base the amount on volume of business——

Senator GORTON. So you are not necessarily against a higher bond level. You simply think that there ought to be more flexibility?

Mr. ELBERT. Yes. That's right. We don't think it should be a specific amount. Going the other way, with inflation the way it is, 10 years from now—considering that it took 65 years for us to get from 1916 to 1981 to propose $150,000 bail—bond; 10 years from now this may be ridiculously low. I feel if the agency is going to have any power at all, that this may be one case where it should have the ability to set bond in accordance with conditions in the trade.

Senator GORTON. Senator Cannon?

Senator CANNON. Are you suggesting then that the freight forwarders are not adequately regulated at the present time?

Mr. ELBERT. No, sir. At the present time they are—they have a licensing system and they are subject to a bond under the Federal Maritime Commission which determines what that bond should be. As a matter of fact, I understand as of October 1, the previous amount of bond required is going up under FMC orders.

Senator CANNON. I was interested, Mr. Ortiz, in your testimony on the first one or two pages where you say the last several years most of the proposals for amending the Shipping Act of 1916 have authorized formulation of shippers' councils. There are inferences that if shippers' councils are established, they'll offset the power of closed conferences. We may not agree with this premise. Although we are anxious to secure antitrust exemption for shippers' councils, we may not support legislation which also includes the authorization of so-called closed conferences.

Don't you think that granting antitrust exemption to shippers' councils in the one case would somewhat offset the closed conference, or do you think you would be better off to not have any antitrust exemption at all?

Mr. ORTIZ. That question must be answered in relative terms. Could the Senator clarify?

Senator CANNON. Let me put it a little different way.

You are urging that you get antitrust exemption for shippers' councils, but you do not want to authorize the so-called closed conferences. On the other hand, if you have antitrust exemptions being granted, the implication there is that you needed an antitrust exemption, or somebody would have you before the courts in an antitrust suit.

Now, I'm wondering if maybe we'd be better off to not have any antitrust exemption at all.

Mr. ORTIZ. I don't have any particular problems with our antitrust laws the way they stand right now.

My particular concern is, whenever there is an exemption to antitrust laws, which would give one particular body a little more freedom than the other. We are shippers and our interests are rather parochial, since we are the ones that pay the freight. We're concerned that we get the correct rates and we get the best of service.

We don't necessarily think that we have obtained the best of both worlds. With regard to that we would like to have some more input as to finding out whether we are getting the best rate and the best of service. There is no arena right now where we can really judge whatever rate a conference dictates to us unless we present a full formal proceeding before the Federal Maritime Commission, which is very hard for any shipper to promulgate.

Senator CANNON. If the FMC did not approve, then even the existing open conferences would undoubtedly violate the antitrust laws. Isn't that correct?

Mr. ORTIZ. That is correct.

Senator CANNON. The FMC and the Department of Justice in the past have maintained many agreements for economic cooperation among conference members, including pooling agreements and so forth, prevent competition from carriers outside the conference. Now, in many cases, however, the FMC has still approved them under its section 15 authority, and they have thus received immunity from the antitrust laws.

Should that continue to be the case, do you believe?

Mr. ORTIZ. We really have no position on that, although we would be anxious to look into the situation and respond.

Senator CANNON. If rate decreases are allowed to become effective, upon publication and filing with the FMC, won't failure to require some advanced notice encourage private discriminatory arrangements between shippers and carriers, and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rates?

Mr. ELBERT. Are you talking about individual rates, Senator? Individual commodities?

Senator CANNON. Yes.

Mr. ELBERT. I assume that you are aware, when we're talking shippers' councils, the shippers' councils will not get into individual commodity rates under any circumstances; that the only purpose of shippers' councils is to negotiate on overall general rates, general services, and general practices; and that it should be open to individual firms to negotiate their rates individually, if they want.

Senator CANNON. No. My question did not relate to shippers' councils.

Mr. ELBERT. Then I don't understand the question.

Senator CANNON. What I'm suggesting there is that, if rate decreases are to become effective upon publication, upon their publication and filing, wouldn't failure to require some advance notice encourage private discriminatory arrangements between shippers and carriers, and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of those lower rates—just an ordinary tariff on file?

Mr. ELBERT. If you're going to have a competitive system, you're going to run into this at some time or another. You can't help it. You can't protect every shipper that he's going to get the best rate and will know at a particular time when a particular rate is going into effect.

The chances are that the way the communications are, that most of the trade will be well aware of what's going on. They may not know exactly when the rate is going to be effective, or a date or a time; but I can't believe that this would be a real inhibition.

Senator CANNON. Should a carrier be required to file a tariff with the FMC if the cargo is loaded or off-loaded at a Canadian port, as long as it's origin or destination is in the United States?

Mr. ELBERT. We don't believe so.

Senator CANNON. Thank you.

Senator GORTON. We will reserve the right to submit additional questions in writing, with your permission. But with that, we should like to thank you for your participation.

[The statement follows:]

STATEMENT OF AMERICAN IMPORTERS ASSOCIATION

Mr. Chairman and members of the Subcommittee: My name is Peter Ortiz. I am General Manager, Traffic, of Hitachi Metals America of White Plains, N.Y. and Chairman of the Transportation Committee of the American Importers Association. With me today were Edwin A. Elbert, Senior Consultant, and Hubert Wiesenmaier, Transportation Consultant of our Association. Since 1921, the American Importers Association has been the only national association representing importers. We have over 1300 members including, in addition to importers, firms who service the import industry, such as Customs brokers, bankers and Customs lawyers.

We appreciate the opportunity of testifying with respect to S. 1593 and S. 125. As a number of our members are exporters as well as importers, and the legislation under consideration applies equally to both, our testimony will represent both interest among our membership.

As has been the case in previous proposals to amend the Shipping Act of 1916, there still seems to be a desire to strengthen the ocean carrier conferences at the expense of the user of ocean transportation—the exporter and importer. In the last several years, most of the proposals for amending the Shipping Act of 1916 have included the legalization of Shipper Councils and the inference is that if Shippers Councils are established, they will offset the legalization of "closed" conferences. We do not agree with this premise. Although we are anxious to secure antitrust exemption for Shippers' Councils, we will not support legislation which also includes the authorization of so-called closed conferences.

It is heartening to read the objectives contained in S. 1593, and we strongly support those calling for (1) an efficient ocean transportation system with minimum government involvement; (2) fostering of reliable and responsible service by ocean carriers and conferences and (3) assuring that ocean transportation rates and practices for U.S. exporters and importers are competitive, and not unjustly discriminatory.

These are high-sounding principles and by themselves no one could object to them. However, they are watered down by the objectives to harmonize U.S. shipping practices with those of its major partners. The United States is the premier international trading country in the world and it is our belief that we should set the standards rather than the other way a round.

Having thus stated our principle positions in respect to the major concerns of the proposed bill, we would not like to address the areas that have been of uppermost interest to us, namely the authorization of Shippers Councils, their working relationship with conferences, and the potential impact of closed conferences on shipper-interests:

The underlying principle of effective U.S. Shippers Councils have been stated by AIA on many occasions, and in the main follow the recommendations adopted by UNCTAD:

(1) to unite U.S. shippers to give them sufficient bargaining strength to obtain adequate services at minimum cost from liner ocean carriers;

(2) to balance the considerable power of conferences in setting rate levels by adopting mechanisms that mandate the settling of disputes between a Shippers Council and conferences;

(3) to provide shipowners, government agencies, port authorities and other persons subject to the Shipping Act with a means of communicating with shippers, and of obtaining an authoritative shipper viewpoint; and

(4) to allow shippers to take the initiative in collaborating with shipowners and conferences as well as government bodies in assessing the suitability of existing services, and to investigate the possibilities of more economical alternatives.

As you are undoubtedly aware, the American Importers Association has been in the forefront of the move to grant Shippers' Councils in the United States the same exemption from the antitrust laws that have been granted to the carriers. We believe that Shippers' Councils should represent both importers and exporters and they should concern themselves with general rate levels, rules, practices or services and be authorized to consult and negotiate with ocean carriers and conferences.

AIA spent considerable time and effort to gather information about the operations and effectiveness of Shippers' Councils abroad; as a result we have become convinced that Shippers' Councils in the United States could solve a number of problems that shippers have has with the manner in which conferences have acted.

Some of the problems are as follows:

(1) Rate policies of conferences

Over the years, we have often questioned what can be gained by simple consultation with the conferences. In many cases we could not help but feel that conferences may deliberately inflate their original demands with the intention of making token reductions later on in the interest of public relations. Furthermore, in trade routes where foreign governments exercise a strong influence over conference activities and the setting of rate levels, conferences have reportedly shown insufficient cooperations with Shippers Councils.

(2) Surcharge policies of conferences

U.S. shippers, and shippers worldwide are increasingly critical of surcharges imposed by conferences. At present such major surcharges are Bunker Surcharges, Currency Adjustment Surcharges and Port Congestion Surcharges. Although surcharges should be only temporary in nature, Bunker Surcharges have become a regular cost item for shippers. Conferences seem to use the bunker surcharge far too liberally as a tool to circumvent the process of negotiating general rate levels with Shippers Councils.

(3) Supplemental service charges by conferences

During recent years many conferences serving U.S. trades have implemented certain port service charges that heretofore were included in the carriers' basic ocean freight rates. Today such supplemental charges represent a considerable cost item to shippers, and should therefore be included in the list of authorized activities of a U.S. Shippers' Council to give the Council sufficient impact in all major areas that are relevent to shippers' transportation costs and services.

Based on the aforementioned principles regarding the need to authorize Shippers Councils, and to provide Councils with sufficient "bargaining power" to deal effectively with real-life problems in international shipping we now would like to comment on certain sections of S. 1593:

We suggest that the term "Shippers Council" be defined more specifically as follows:

"The term 'Shippers Council' means a broadly representative association of U.S. shippers, (exporters and importers), other than non-vessel operating common carriers, that is formed for the purpose of engaging in the broad range of shipper interests authorized in Sec. 4; except that, for the purpose of this paragraph, no corporation partnership, or other legal entity may be treated as a shipper unless that entity has a proprietary interest in the merchandise that such entity imports into, or exports from, the United States."

In respect to Shippers Council Activities we strongly suggest that they be broadened and strengthened by incorporating the the principles stated by us as follows:

Sec. 4. (c) Shippers Council Activities.—Shippers who are members of a shippers council organized or existing under the laws of the United States may—

(1) mutually consult and exchange information or views, and agree on common positions regarding: general rate levels; surcharges; supplemental service charges; terms, practices and conditions of service affecting ocean transportation and intermodal transportation; and

(2) consult and negotiate with any ocean common carrier or conference regarding general rate levels, surcharges, supplemental service charges, and terms, practices and conditions of service.

(3) exhange information with ocean common carriers, conferences, and any other persons subject to the Act, concerning traffic and transportation data, and provide for the distribution of such information to members of the Shippers Council.

We have expressed earlier our concern about disputes that may arise between the Shippers Council and a conference of a specific trade. This committee is to be congratulated on its foresight to address this question in Sec. 5(c). Anticipating problems of interpretation, however, we would like to suggest that the bill be more specific, and should read:

(c)(5) provide for a consultation process with U.S. Shippers Councils designed to insure—

(A) regular, timely and orderly communications and exhange of information with Shippers Councils concerning general rate levels, surcharges, supplemental charges, and terms, practices and conditions of service;

(B) procedures for promptly and fairly considering Shippers Councils and shippers requests and complaints;

(C) cooperation in preventing malpractice; and

(D) commercial arbitration of disputes with the Shippers Council in its trade, regarding general rate levels, surcharges, and supplemental service charges determined by the conference.

Therefore, in order to give U.S. Shippers Councils the strength and effectiveness they need to assure shippers of continued competition in the worldwide trades, we feel it is essential that U.S. legislation mandate conferences to:

(a) establish provisions for consultation with the appropriate Shippers Council, and to negotiate and agree on:

(1) general rate levels;
(2) surcharges;
(3) supplemental charges; and
(4) terms, practices and conditions of service.

(b) submit to mandatory (commercial) arbitration of disputes between a conference and the appropriate Shippers Council; and

(c) furnish Shippers Councils sufficient data in support of requests for increases of general rate levels, increases of surcharges, or supplemental service charges.

As shippers we are understandably also concerned with so called "loyalty" contracts that are offered by conferences. The proposed bill diviates, at least in its intent, little from the provisions of the 1916 Shipping Act as it is in effect right now. However, a few changes that were made in S. 1593 appear to present a problem for shippers:

Under Section 7(a) Contract Requirements, paragraph (3)(A) stipulates that contract rates may not be increased on less than 90 days notice, "except upon agreement of the applicable shipper" . . .

We are truly puzzled about this provision, and suggest it be removed from the bill, since we cannot imagine a situation where a specific rate would apply only to a single shipper in a given trade. We firmly believe that if we accept the principle of establishing rate-contracts between conferences and shippers, those contract rates should be valid for minimum (90 day) time periods, unless the tariff clearly limits the validity of a special rate. The latter practice is quite common, and leaves ocean carriers sufficient flexibility to adjust rates under special circumstances.

Likewise, under paragraph (B) conferences would be allowed to increase rates with 30 days notice only, if the rate was reduced within 180 days immediately preceeding the filing of the increase. Such practices would again be very much contrary to the spirit of the contract-rate philosophy, which essentially assures shippers of rate stability. To allow dual-rate conferences to increase rates in less than 90 days would put contract shippers at the risk of pricing orders on reduced cost—and to face unexpected higher transportation cost by the time the goods are shipped.

With respect to the proposed authorization of so-called "closed" conferences, we would like to submit our views and concerns.

In the absence of strong competitive forces, liner conferences have usually raised freight rates, imposed surcharges, and changed tariff rules and service practices unilaterally without consulting shippers. Fortunately, for U.S. shippers, the Shipping Act, 1916, permits any carrier willing and able to serve a particular trade, to join the conference in that trade or remain uncommitted as a so-called, "outsider". This philosophy has served the U.S. economy well, and we believe that the same principles have created the most competitive services in our international trade. They have made it possible for many shippers to compete in world markets with the help of low-cost transportation services that are available to us today. In sum, the very existence of strong outsider services—offering lower rates to shippers—has been of vital importance, and in fact has been the only and last resort to obtain rate-concessions from liner conferences.

Many of our members, of course, are using the services provided by conference carriers—and we do recognize the impact conferences can have on the stable development of trade by providing regular and frequent services.

However, as we have testified in the past, "closed" conferences must be recognized as cartels, and we know of practically no instance where cartels have provided better service at cheaper prices to consumers. For years we were told that the telephone industry was able to provide better service because one company controlled the major portion of the facilities in this country. Now that this monopoly has been broken, we find that service can be provided at rates considerably below those previously charged. We are, of course also aware of the problems of overtonnaging that prevails in a number of major trade routes—and we sympatize with U.S.-flag carriers that find themselves in situations where our foreign trading partners seem to have considerable influence on shipping and conference policies, which sometimes are lacking the flexibility to respond to market conditions quickly. Needless to say that much of the blame for overtonnaging in certain trades rests with the very same parties that now complain the loudest about it, to wit: between Oct. 1977 and June 1980 Sealand increased their container capacity in the U.S. West Coast-East Asian Trade by 57.2 percent—APL by 19.6 percent, BBS by 16.4 percent and Maersk by 17.6 percent. The carriers were all conference members. (FMC Staff Report "East Asia Trade Study" page 127). During the same period the available volume of cargo declined markedly. There is no question in our minds that before U.S.-flag carriers or any other conference carriers would consider to rationalize/reduce their tonnage—they would first have to sharply reduce or eliminate the competitive threat posed by outsiders. We therefore view a call for so called "closed" conferences essentially as a call for eliminating ousider competition in the trade.

Once outsider competition is eliminated, however, shippers have no assurance whatsoever that the members in the closed conferences will not maintain their pace of expansion in order to increase their market share—or to achieve as a national flag-group the market share they feel should be theirs. In short, the idea of authorizing so called "closed" conferences, i.e. conferences that would have the power to exclude even U.S. carriers willing and able to serve our trades, brings about visions of strong cartels and cartel-like behavior by conferences--this is rather foreign to our thinking, and we have for these reasons opposed legalization of "closed" conferences.

Finally, we would like to comment briefly on Section 11 covering Freight Forwarders and NVOCCs. We favor a licensing system for forwarders, as well as a provision for them to furnish bonds. However, we feel that the amount of the bond should not be specified in legislation, but should be at the discretion of the Federal Maritime Commission.

Again, we thank you for the opportunity of appearing before you.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. Should NVOCC's be relieved of their present obligation under the law to file tariffs?

Answer. No—NVOCC's should be required to file their tariffs with the FMC to the same extent vessel operating common carriers do. To be relieved of this present obligation would result in rate discrimination, willfully or unwittingly, and would make it practically impossible for shippers to depend on rate quotations by NVOCC's.

Question. From the shipper's point of view, would a mandatory right of independent action sufficiently offset what you perceive to be the adverse effects of closed conferences?

Answer. We believe that support for the principle of one conference member's right of independent action is strongest under "open" conference conditions. Open conferences have traditionally reacted only slowly to outsider competition—placing greater emphasis on the enforcement of loyalty contracts than on the reduction of rates to meet the competition by outsiders. A "closed" conference system, however, would in our opinion direct its combined market power towards the elimination of outsiders, and will be much more effective in that endeavor than an open conference. Once outsider competition is reduced, the need for independent action will be more or less moot, since the closed conference will usually have cargo sharing and pooling agreements in place.

Question. A few years ago a study done by the Department of Justice recommended open conferences and a statutorily mandated right of independent action.

This recommendation I should note was made by the Department after it concluded that it would not be politically feasible to recommend abolition of the conference system.

In other words, independent action was the next best thing.

Would you please comment on the following testimony why mandatory independent action is not desirable:

If anything, it would seriously inhibit development and maintenance of an efficient, innovative, and economically sound ocean transportation system. Independent rate action between member carriers of a conference is totally destructive of the fundamental principles of liner conferences . . . independent rate action does not only put a conference at risk but also potentially prejudices the interests of smaller shippers, as it is evident that the so-called independent rate action device will favor shippers who control large blocs of cargo; triggering the mechanism would be tantamount to legalizing unofficial rebating.

Answer. Taking the above testimony at face value, it tells the shipper actually the following:

(1) Conference rates must be kept high, regardless of competition and economic conditions.

(2) Rather than adopting a philosophy of flexibility that responds to market needs, the principle of a cartel must be upheld at all cost.

(3) Small shippers will be touched to hear that they are the beneficiaries of a strong conference system. But—is it not true that those commodities that move in large volume always receive the benefit of special rate consideration?

(4) We are all living in a real world, and it is foolish to deny that the more transportation dollars are spent by one shipper or a group of shippers, the greater the attention they receive from all carriers. Nevertheless, once special rates are established by a carrier through Independent Action, even small shippers trading in that particular commodity can take advantage of a reduced rate.

Last, but not least—many shippers that generally support conference carriers are much too often put at a disadvantage because their preferred ocean carrier may drop out and re-join the conference repeatedly, since no other mechanism is available to resolve differences of opinion on rate strategy in the conference.

Question. Since you were opposed to close conferences, I take it you would not agree with the following analysis by Dr. John Roberts in support of closed conferences:

"Indeed, there is a strong case to be made that if the choice is between a system of cartels (conferences) or one of closed cartels, the latter may be preferable, even though structurally it departs more from the competitive idea. The reason for this is that the closed cartel may be able to achieve lower costs than would an open one, and even if these are not passed through as lower prices, less waste is still desirable. Thus, if 'co-operatively organized and appropriately rationalized' through capacity controls and pooling agreements, the closed conference can be expected to achieve something like minimum costs for the level of service it provides."

For the record, would you comment on Dr. Roberts' conclusion?

Answer. Dr. Roberts' conclusions are the reasons why we as shippers oppose closed conferences. We, too, believe that the carriers' lower cost will not be passed on to shippers—in fact, we are certain that a closed conference, like any other strong cartel, will increase their rates to the maximum extent possible, while reducing services to an absolute necessary minimum.

Question. Those who support closed conferences maintain that conference rates are not kept artificially high because if they were, independents would be attracted to the trade, and the conferences don't want that.

Would you please comment?

Answer. Why should shippers bear the burden of the risk of whether or not conferences would aim for increased rates or not. The fact is that right now independent carriers provide first class services—often times superior to those provided by conference carriers--in many trade routes. These non-conference carriers also offer substantially lower freight rates than conferences. As shippers we have a great interest in seeing these independents remain in our trades. We have absolutely no desire to support any scheme that would drive the independents out of major trade-routes—since we seem to be assured by the above statement that the closed conference would want to prevent independents from entering a trade again.

Question. (A) In your view, does the Shipping Act now permit the FMC to authorize "contract carriage" agreements, such as the time-volume discount?

(B) If "Contract carriage" agreements are to be permitted, should they have certain safeguards to assure they are available to all carriers who are similarly situated? What should those safeguards be?

Answer. (A) We believe the Shipping Act authorizes "contract-carriage" agreements such as the time-volume discount—as long as such agreements and discounts are available to all shippers that can meet the prescribed conditions, and as long as such agreements are not otherwise discriminatory.

(B) If "contract carriage" agreements are part of a conference tariff then they would be available to all carriers that are interested to subscribe to them.

If "contract carriage" agreements are made by non-liner ocean carriers, or are published by individual non-conference carriers (in their own tariff) there should be no specific requirement or mandate for other similarly situated carriers to all provide the same agreement. That would in our view be a commercial decision that each carrier should be free to make on its own.

Question. (A) Would "contract carriage" agreements be exempt from the antitrust laws under S. 1593 and S.125?

(B) If not, should they be?

Answer. (A) It is not clear to us whether or not these agreements are exempt from the anti-trust laws under S. 1593 and S. 125.

(B) No.

Question. S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory", or (II) "detrimental to the commerce of the United States."

(A) Do you believe these two standards are sufficiently clear and precise so that shippers will readily know their rights under the law to file timely protests with the FMC; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. We believe the average shipper has very little knowledge of the 1916 Shipping Act and its various provisions. Those shippers that will from time to time file a protest with the Federal Maritime Commission may usually find that the Commission seems to be rather limited—either by manpower, or by its authority—in taking effective action upon shipper complaints. Example: Despite its previous ruling "against" ILA's 50-Mile rules, the Commission took the longest time to respond to the 1980 re-institution of the very same rules that the FMC previously found are in violation of the Shipping Act.

We do not recall a case that would help to illustrate what kind of circumstances would be "detrimental to the commerce of the United States" in respect to shipping agreements.

Question. (A) In your view, do conference pooling agreements, and space chartering agreements prevent or regulate competition from outsiders?

(B) Should antitrust immunity extend to these kinds of activities?

Answer. We believe that pooling agreements between members of the same conference are authorized by the 1916 Shipping Act, subject to FMC approval. In those trades where they exist within an open conference system (we consider the trade routes to/from Brazil, for instance, to be a "closed" conference dominated by a bilateral shipping agreement) pools did not unduly prevent outsider competition.

(B) There should be no sweeping anti-trust immunity for pooling agreements. Present safeguards under the 1916 Shipping Act should be maintained.

Question. Should the activities of non-vessel operating common carriers be exempt from the antitrust laws; or should they be treated differently than ocean common carriers?

Answer. No.

Question. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. We believe the FMC is quite capable to decide whether or not rate decreases are filed in a manner that would be discriminatory against certain shippers (that would be prevented from using the same low rates).

The question seems to address rate filings by independent carriers only (conference carriers decide on rate matters through their joint rate committees). One would have to assume that outsiders competing with each other must have the interest and commitment to keep an eye on each others rates. Failure to do so—and missing out on available tonnage—is obviously a business risk that should not be regulated through the Shipping Act.

There is some limit to the protection that should be given, even to a shipper.

Question. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. We support any measure that prevents illegal rebating, and further recommend the FMC retain all of its present authority to investigate and prevent illegal rebating.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S.-liner trades?

Answer. We see no adverse consequences—in the contrary: ocean transportation services and rates would be determined in negotiation between the shipper and the carrier. Most likely lower freight rates would result from those free negotiations due to real competition of all carriers for the available cargo.

Another benefit would follow, and that is that U.S. shippers would become far more educated in the ways of competitive shipping, and would be able to take full advantage of their relationships with U.S. carriers to compete in the world markets.

Question. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill, as S. 1593 provides, might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril, and they might be reluctant to take the risk?

Answer. We cannot see any benefit in re-defining existing authorized loyalty contracts or changing the requirement of prior FMC approval. These loyalty contracts have been in existence for many years, certain standards have been set by the FMC that are fairly easy to understand by all conferences, and the FMC has continually updated their rules and standards as new questions of interpretation may have come up. In other words, there is no need for re-inventing the wheel.

Senator GORTON. We now call on Mr. H. G. Miller of the Chemical Manufacturers Association.

Mr. Miller, you may proceed.

STATEMENT OF H. G. MILLER, DIRECTOR OF DISTRIBUTION, LUBRIZOL CORP., REPRESENTING THE CHEMICAL MANUFACTURERS ASSOCIATION, ACCOMPANIED BY WALTER MORGAN, MANAGER OF TRANSPORTATION POLICY, UNION CARBIDE CORP.

Mr. MILLER. Good morning. My name is H. George Miller. I am director of distribution for the Lubrizol Corp.

Appearing with me today is Mr. Walter Morgan, manager of transportation policy for Union Carbide Corp.

We are appearing on behalf of of the Chemical Manufacturers Association, which we will call CMA.

CMA is a nonprofit trade association having 183 U.S. member companies, representing more than 90 percent of the production capacity of basic industrial chemicals within this country. Total shipments of chemical and allied products were valued at $162.3 billion in 1980. Exports totaled over $20 billion, and exceeded imports of chemicals by more than $10 billion, therefore contributing over $10 billion to the U.S. favorable balance of trade.

Foreign trade is thus a matter of major importance to the chemical industry. As one of the Nation's largest industries, we support a favorable balance of trade as crucial to the long-term interests of both the industry and the Nation as a whole.

The chemical industry has supported the very successful congressional programs to reduce regulation of domestic transportation and feel that shipper, carrier, and public interests will be best served by minimum Government involvement and maximum reliance on market forces in international transportation, as well. We strongly support the objectives set forth in section 2 of S. 1593.

Several elements of the proposed legislation, in our opinion, would increase regulation and reduce competition. These would adversely affect the ability of U.S. chemical shippers to participate in an increasingly competitive world market. I would like to highlight those areas CMA members feel are most crucial to assure ocean transportation rates and practices for U.S. exporters and importers that are internationally competitive.

First, closed conferences are prohibited by the current act. Since their authorization could stifle competition, CMA opposes closed conferences.

Two, mandatory right of independent action is necessary. The absence of the right of independent action could create a monopoly situation if the majority of the conference carriers are not U.S. carriers and would not be responsive to the commercial interests and needs of this country.

CMA therefore supports the principle that common carriers, as members of a conference, should retain the right of independent action on rate matters. This will be particularly important if the conference clearly becomes exempt from antitrust laws, as provided in section 8(a)(1) of the bill.

INTERMODAL RATES

The availability of through intermodal rates greatly simplifies documentation and facilitates foreign trade. CMA supports such availability. Intermodal rates should be published by each ocean common carrier, and each carrier should retain the right of independent action with regard to such rates. This will greatly benefit small chemical exporters, who lack the staff needed to track port costs and inland transportation costs abroad.

CONTRACT RATES

CMA supports the principle of freedom to enter into contracts. Contract rates should thus be permitted with ocean common carriers, similar to the provision for contract rates with railroads in the Staggers Rail Act of 1980.

BURDEN OF PROOF

CMA questions the equity of shifting the burden of proof to the shipper if there is a legitimate objection to approval of a proposed agreement. Shippers generally do not have access to all of the relevant data needed to effectively meet this burden of proof. Section 6(c) of the bill could present an impossible task for shipper compliance.

OCEAN FREIGHT FORWARDERS

CMA favors continuation of current licensing requirements for ocean freight forwarders. Recent bankruptcies of freight forwarders have resulted in losses for shippers in excess of $1 million. We therefore support licensing procedures as a control to assure that freight forwarders will be financially qualified to perform the services they offer.

CMA also supports bonding of ocean freight forwarders and nonvessel-operating common carriers, but recommends that having those bonds be in the $500,000 to $1 million range would be more appropriate.

TIMING

CMA confirms the importance to shippers of the timing provisions in the bill that call for the following:

Continuation of the provision that rates cannot be increased on less than 90 days' notice;

Effectiveness of changes in rates which reduce shippers' costs upon publication and filing; and

Prompt releases when conference carriers cannot furnish space to a shipper who has signed a loyalty contract.

CMA appreciates this opportunity to comment on this important legislation. We plan to submit a supplemental written statement explaining these points in detail before October 4, 1981.

We will be glad to respond to Senator Inouye's and other questions that come up. While we have directed this at S. 1593 for convenience, many of the principles would be applied to S. 125 or the other legislation. And if desirable, we would be glad to comment specifically on their application there.

Thank you very much for your attention.

Senator GORTON. Mr. Miller, how do you explain the fact that European shippers don't worry about closed conferences and the lack of right of independent action among conference members?

Mr. MILLER. To my knowledge, I'm not sure that European shippers do not worry about this. I think it a concern of theirs. From some experience we have had working with them, there's a great deal more effective flexibility within those systems than we would have under the regulation here.

Senator GORTON. Could you expand on that a little bit? In what respect?

Mr. MILLER. Typically, as we understand it, you can negotiate with individual carriers for specific rates, particularly if you have a high volume movement.

Senator GORTON. How effective do you think the consultation process required by S. 1593 between shippers and carriers will be?

Mr. MILLER. You're talking about the shipper councils?

Senator GORTON. Yes.

Mr. MILLER. I'd like to ask Mr. Morgan to comment on it, and then I'll comment on where CMA stands at the moment.

Mr. MORGAN. With respect to the shipper councils, the chemical industry has had some serious reservations, first of all, with respect to—when they were originally presented, the concept of shipper councils was originally presented, it was presented on a quid pro quo basis for the closed conference arrangement. In no way could the shippers who had experience overseas accept the idea that shipper councils could counterbalance a closed conference. It just isn't so.

The other problems that shippers have with the concept of shipper councils has been the idea that it is an extension of regulation, the filing of an agreement with the FMC or some other agency. I think it was a previous witness who indicated some concern, and this bothers a number of shippers too, is the idea that shippers' councils would go beyond the broad general transportation matters and get into specific rates, and no one wants anyone else negotiating their individual rates or having the ability to influence their specific rates. So these are all the negatives as far as shippers' conferences are concerned.

There is a body of opinion in the chemical industry and among other users that the shippers' councils would be an effective mechanism for improving dialog, communication, and planning between the carriers and the shippers. Some of the objectives that are outlined in this bill, and you commented in your preamble, Senator, could be more readily accomplished through better communications. Right now there is almost an adversarial relationship between shippers and carriers.

This has impeded the growth of the American-flag industry. There is a need for some kind of get together here. So there is a feeling that some arrangement whereby shippers and carriers could discuss things like currency, surcharges, general rate increases, bunker surcharges, discussions for future planning. This kind of arrangement is necessary and whatever is needed in order to accomplish this without having us thrown into jail for violation of the antitrust laws would be ideal.

Senator GORTON. Would you elaborate on your view as to how contract rates would be negotiated and how they would function in the real market?

Mr. MILLER. Members of CMA have been working on developing a sort of a prototype for this, and the task group working on this has not had a chance to review these in detail, but basically, we would see the contract as fulfilling a need where there are particularly high-volume movements to move within a short period of time, that may not really fit the conference ability. And under those circumstances, we're competing with shippers from other major industrial countries who, in some cases, have the ability to develop this type of contract, and our thinking is it should be a commercial contract. There should be a commitment of volume to the shipper, to the shipping company, not just an opening of rates, so that this would work on a basis of a typical commercial contract under guidelines of the FMC.

Senator GORTON. Do you believe it necessary or desirable to continue requiring that tariffs be filed at the Federal Maritime Commission and enforced by the Commission?

Mr. MILLER. The CMA has not taken an official position on this. I will comment personally, if I may. I think that we are trying to balance—you are trying to balance two very important things. It is the development of a healthy U.S. merchant marine and the interests of shippers. And we strongly support both of these principles. We feel that it might be very difficult to find a way to support the American merchant marine without some form of tariffs and filing. Also, there is some benefit to shippers in the filing and availability of rates and the continuity of rates in our 90-day period, in that in most cases we are committed to deliver at these rates under contracts and letters of credit that can't be changed.

So personally, I feel there is a value in this in some form, both some benefit to the shippers, although there is a countering benefit of freedom, but particularly we feel to the carriers, this does serve a very important purpose.

Senator GORTON. What position do you take on the Canadian diversion issue? Should tariffs be required of intermodal cargoes leaving the United States for Canadian ports?

Mr. MILLER. The position of the CMA is that they should not.

Senator GORTON. Why?

Mr. MILLER. We feel that the filing of these tariffs would not serve a useful purpose for U.S. commerce. We have some questions as to whether you can enforce this type of thing on operations out of a third country. In our supplemental statements we will file some comments on the intermodal rates.

As we mentioned, we feel these are extremely important, very valuable, but quite difficult, perhaps, to do in a conference environment. An article I saw recently indicated there were 120 conferences filed and operating out of the United States. And port to port, you have a limited number of rates. You will go from inland point to inland point in other countries, and you have an infinite number of rates to put up with. We feel as a practical thing, the filing of these by the individual carrier would be far more effective and serve the interest of both the carrier and the shipper.

Senator GORTON. Freight forwarders generally insist that a bonding requirement should not be intended as a means of indemnifying shipper. On the other hand, you propose an increase an increase in the bond amount from $30,000 to perhaps as much as $1 million. Do you believe, as a practical matter, more than a tiny handful of freight forwarders could obtain such a bond?

Mr. MILLER. I would think they could, unless they are not operating with financial stability. Again speaking personally, our company was cut in one of these situations. Typically, you can say, well, you can find out what the economic condition of a freight forwarder is; however, many of these are privately held companies. What they are required to file, other than through the FMC in financial information is very limited and, therefore, you cannot always, even with prudent checking, be sure of the stability.

Senator GORTON. That implies that you feel the indemnity function is really quite important?

Mr. MILLER. Yes. I think it serves a very useful purpose at this point in time.

Senator GORTON. Again, I should like to thank both of you for coming, and to say that there will be some written questions from Senator Inouye and perhaps from us as well.

[The following information was subsequently received for the record:]

SUPPLEMENTAL STATEMENT OF THE CHEMICAL MANUFACTURERS ASSOCIATION

In considering changes in the Shipping Act of 1916, it is essential that the need to facilitate exports be balanced with the actions necessary to support the United States Flag Merchant Fleet. While U.S. shippers strongly support U.S. Flag operations, regulations which restrict the ability of U.S. exporters balance of payments, U.S. jobs and ultimately the strength of U.S. Merchant Fleet.

The following will expand on the brief comments made on the oral testimony on September 23 and to cover additional points that time did not permit including in the oral testimony.

Closed conferences.—CMA feels that closed conferences, particulary where there is no right of independent action, could create a monopoly. In most cased the majority of the conference carriers will not be U.S. flag carriers responsive to the needs of U.S. Comerce. We do not feel that innovation will be stimulated in this atmosphere. The experience of CMA member companies in Europe wowuld indicate that the laws and the economy of the U.S.A. is significantly different from the conditions in Europe. The fact that closed conferences do operate in Europe does not mean that they would serve U.S. needs equally well.

CMA does support the clarification of the application of U.S. antitrust laws as provided in Section 8 as the present uncertainty creates confusion that works against the interest of shippers and carriers in taking timely action.

Mandatory right of independent action.—CMA feels that independent action by ocean common carriers should be required in all loyalty contracts. We would not object to a provision requiring negotiation with the conference prior to seeking rates through independent action with the individual member conference carriers. However, this would have to provide that the timing of negotiation for action by the conference would be short, and that the individual carrier would be permitted to publish rates that would be effective immediately upon filing with the commission.

CMA rejects the argument that the right of indpendent action would work to the disadvantage of small shippers. A small shipper is much more likely to secure a rate reduction in negotiation with an individual carrier than he would with a conference where the potential income for any give carrier would be small.

Intermodal Rates.—The availability of through intermodal rates greatly simplifies documentation and facilitates foreign trade. Availability of through rates are particularly valuable to the small chemical exporter who lacks staff to keep abreast of port costs and inland transportation costs abroad.

With the emphasis on advanced technology and leadership in containerization, U.S. Flag carriers are in a unique position to capitalize on the use of through intermodal rages. To provide through intermodal rates, ocean common carriers to and from the U.S.A. must negotiate a complex series of rates between ports and inland points in the U.S.A. and in foreign countries. We doubt that this type of complex negotiation can be handled in a timely manner though a conference structure. For this reason, we adocate that individual carriers be free to develop and publish these essential rates without conference jurisdiction. As long as each carrier retains the right to publish through intermodal rates, we have no objection to rates also being published by the conference.

It must be recognized that the flexibility in routing intermodal movements can benefit carriers and shippers and it changes the concept of natural routes from inland points. For this reason, the primary responsibility for publication of intermodal rates should rest with the carrier.

Ocean freight forwarders.—Recent bankruptcies of freight forwarders, some of which resulted in shipper losses in excess of a million dollars, justifies the need for better assurance of financial responsibility for freight forwarders and non-vessel measure of control to verify that forwarders are qualified to perform the services. Forwarders are typically closely-held service companies who are not required to publish financial data under U.S. law. Traditional credit checks such as Dun and Bradstreet, often give little information to assist shippers in evaluating the true financial condition of these organizations.

CMA supports the addition of a bonding requirements in an amount which is more consistent with the amount of client's funds that are regularly held by these organizations in the performance of their services.

Timing.—At first glance it may appear inconsistent to advocate dregulation, a requirement that an increase in rates connot be effective in less than 90 days notice while providing that rates which reduce shhippers cost can become effective on publication and filing.

Provision for the 90 days notice of freight increase recognzies the reality of export operations. In order to complete with local producers in other countries, shippers must regularly quote CIF prices which are firm for extended periods. Currency restrictions, licensing, documentation, and letters of credit all make it extremely difficult to change any element of the CIF price once it is quoted and accepted. Typically, several months will be required between the time a firm quotation is made and the confirmation of the order, securing import licenses and completion of production, booking, documentation, and shipment of the product. Carriers have recognized ths need and the 90 day provision has been included in the conference agreements for many years.

An increasing amount of business broad is handled through bids or tenders. Many of these tenders are requested by governments or by government controlled companies. To meet bid schedules, U.S. shippers must be able to determine promtly the ocean freight rate can be assured. If U.S. shippers and the carriers serving the U.S. are to full participate in this type of business, it is absolutely essential that the shipper be able to negotiate the best possible rate for the movement involved and to be certain the rate will be effective promptly.

While Section 7(a) 3(A) protects the 90 day period on rate increases, (B) appears to limit this necessary provision. Section 9)b) appears to be in conflict as it implies increases can become effective in 30 days. If "Initial Rates" refer to publication of rates in an existing tariff for a commodity for which no rate is published, the above cited needs of U.S. Commerce dictate the need for "initial rates" to be effective on publication.

Sales contracts often require shipment by a specific date and letters of credit expire if the shipment is not accepted by the carrier by that date. When a shipper contracts for delivery based on availability of conference space, it is essential that the conference provide the space or promptly release the shipper if the conference cannot meet the shipper's needs.

Compensation of freight forwarders by carriers.—Section 11(c) imposes a more strict requirement for the performance of specific services for forwarders to be eligible for compensation by an ocean common carrier. In actual practice, any of the individual services listed may be performed by the shipper. It is in the interest of the individual shipper to be able to secure only those service of the forwarder that are most advantageous for the given shipment. In many cases the shippers will directly handle the booking of certain space and the option to handle booking is important in many situations.

Rather that requiring that each of the listed services be performed by the freight forwarder, we would recommend modifying the wording to provide that each of the listed services must be offered by the freight forwarder and the forwarder must be prepared to perform the specific services required by the shipper to qualify for compensation by the ocean common carrier.

A rigid requirement that each of the services must be performed on each shipment would disrupt the efficient handling of many movements.

Section 19(a) Repeals.—Protection of current shippers rights under the present act and FMC dockets.

Over the years a series of issues important to shipper have been resolved through FMC dockets under the authority granted in the present act as amended. In cancelling sections of the act it is important that such esssential protection of shipper rights not be adversely affected.

A case in point is the charter exemption which is included in most loyalty contracts and was covered by FMC Docket III page 5035. The authority for the FMC ruling appears to have been derived from Section 14 of the Shipping Act Item (9) "contains such other provisions not inconsistant herewith as the commission shall require or permit".

Since this section is cancelled and (9) is not included in S-1593 the future status of the charter provsion may be uncertain.

CMA supports the continued inclusion in all loyalty agreements, the following provision: "This agreement shall not include any shipment by merchant when carried in vessels owned by merchant or in vessels fully chartered by merchant for the exclusive use of the merchant for a period of not less than six months."

This provision permits, in foregin commerce the equivalent of private carriage in domestic commerce. Charters are essential to certain shippers to meet unique service needs in a specific market and their use should not preclude the shipper from participating in loyalty contracts to cover those needs best served by ocean common carriers.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question 1. From the shippers point of view, would a mandatory right of independent action sufficiently off-set what you perceive to be the adverse effects of a closed conference?

Answer. No. A closed conference is a cartel. There may be no economic incentive for any member of a conference to respond to an individual shippers needs if the overriding interest of the cartel is to preserve a high rate level. The right of independent action benefits shippers only if a vessel operator is willing to take action.

It should be noted that a closed conference could be organized in a trade with no American flag carrier included. Once organized, the closed conference could prevent inclusion of an American flag operator.

Question 2. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conference. In many cases, however, the FMC has still approved them under its Section 15 authority, and they have thus received immunity from the antitrust laws. Should this continue to be the case?

Answer. CMA members question the desirability of pooling agreements as they can be used to protect inefficient carriers. With pooling agreements, carriers have less incentive to develop innovative services. It is our experience that where pooling agreements are now permitted, such as in the South American Trades, the trade is characterized by relatively poor service and high rates.

These arrangements could discourage an independent carrier from entering the trade.

From a shipper's standpoint, pooling arrangements are not desirable. With open conferences and each carriers right to take independent rate action, CMA feels shippers rights could be protected, and immunity from antitrust laws could continue.

Question 3. (A) In your view, does the Shipping Act now permit the FMC to authorize 'Contract Carriage' agreements, such as the time-volume discount?

(B) If "Contract Carriage" agreements are to be permitted, should they have certain safeguards to assure they are available to all carriers who are similarly situated? What should those safeguards be?

Answer. (A) We believe contract carriage can be authorized by the FMC under the present statutes, but the status is sufficiently cloudy that an affirmative statement permitting contracts would be useful to stimulate action to meet shippers needs.

(B) The nature of contracts as advocated by CMA are bilateral, i.e., a shipper may commit minimum tonnage to a given carrier in return for service and rate commitments from the carrier. The shipper now has the right to select the carrier on all shipments made under loyalty contracts and he should have the right to select the carrier with whom he will contract. All carriers should have an equal right to negotiate with shippers for contracts, but it would not appear practical to require a shipper to offer the same contract to "all carriers who are similarly situated".[1]

Question 4. Would you please supply for the record your views on the suggestion of the National Industrial Traffic League that as an alternative to shippers' councils, shippers be allowed to consult, either collectively or individually, with carriers without naving to be members of a formal association designed solely for this purpose.

Answer. CMA has not, at this time, taken a position in support of or in opposition to shippers' councils or reviewed the interesting proposal of the NIT League.

Individual CMA member companies have expressed concern that organization of shippers' councils could be difficult. As we understand, about 120 conference agreements are on file with the FMC. U.S. shippers are widely diversified in their interests. The less formal structure proposed by the NIT League would seem to meet this question raised by CMA member companies.

From the specific situations where members of the CMA working group have had direct experience with European conferences, it was very evident that the legal and economic environment in Europe is significantly different from that of the U.S.A. We are not certain the councils are completely effective in Europe and would caution relating European experience to the U.S.A.

Question 5. If rate decreases are allowed to become effective upon publications and filing with the FMC, won't failure to require some advance notice encourage private discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. As CMA stated in its testimony, the timing of rate approvals and a prompt effective date for decreased rates is often essential to permit U.S. exporters to market products. Many of the reduced rates are necessary to meet specific competitive situations or to meet reduced rates promptly available to overseas shippers.

Since all rates are published, the new rate levels will be promptly available to all shippers. The commercial need for timely action outweighs any temporary disadvantage resulting from a prompt effective date.

Question 6. Should independent ocean freight forwarders be licensed by the FMC?

Answer. CMA believes the licensing of independent freight forwarders should be continued as set forth in the CMA testimony on S. 1593.

Question 7. Should the activities of non-vessel operating common carriers be exempt from the antitrust laws; or should they be treated differently than ocean common carriers?

Answer. We have limited knowledge of use by CMA companies of the services offered by non-vessel operating common carriers, so CMA has taken no formal position on this issue.

We see no reason why this class of common carrier should be treated differently from other ocean common carriers.

Question 8. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill, as S. 1593 provides, might have a "chilling" effect on their ues? Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril, and they might be reluctant to take the risk?

Answer. The question raised involves a legal interpretation and an opinion on how carriers might react. We believe the carriers and the conference representatives are best qualified to respond to this question.

Question 9. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. This is an issue on which the CMA task group has not had an opportunity to determine the member companies' position. Since it represents a significant departure from current practice a careful review would be necessary.

One primary objective of the current regulatory program is to provide a framework within which a strong American Merchant Marine could be maintained. Filing of tariffs may further this objective.

One could speculate that removing the requirement to file tariffs could make it more difficult for small shippers to determine rate levels. More consolidation of small shipments could result.

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[1] It is possible the intent was to substitute "shipper" for "carrier" in the second line of the first sentence of B. If "shipper" were substituted for "carrier" we feel the spirit of U.S. practice would require that a carrier be prepared to offer the same contract terms to other like shippers who are prepared to offer the same commitments to the carrier, over the same time period. However, if the carrier lacked capacity to economically handle the second account, the carrier should not be required to sign an uneconomic contract.

It could serve to stimulate competition and would require development of stronger marketing programs by the individual carriers. We would need more information on how this would fit into the total regulatory structure to comment on the balance of potentially beneficial and potential destructive effects.

Question 10. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (Sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. (A) CMA opposes illegal rebating, and any parts of the current legislation essential to equitably enforce this regulation should be retained.

(B) Some carriers might interpret it as an indication the risk from violation would be less, but we doubt that it would make a significant difference as the substance of the law would not be changed.

Question 11. Should NVOOC's be relieved of their present obligation under the law to file tariffs?

Answer. No. As long as they are classified as common carriers under the Act they should not be treated any differently than other carriers.

Question 12. S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory", or (II) "detrimental to the Commerce of the United States."

(A) Do you believe these two standards are sufficiently clear and precise so that shippers will readily know their rights under the law to file timely protests with the FMC; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. It would be difficult to set any standards on this complex area which are completely clear and precise. We agree the statement set for the desirable objectives and have no recommendations to improve them. As shippers we see no serious problems.

Question 13. (A) Would "Contract Carriage" agreements be exempt from the antitrust laws under S. 1593 and S. 125?

(B) If not, should they be?

Answer. (A) If contracts are between an individual shipper and an individual carrier, not a conference of carriers, there should be no need for antitrust exemption.

(B) Under these circumstances, the antitrust laws would apply.

Question 14. A few years ago a study done by the Department of Justice recommended open conferences and a statutorily mandated right of independent action.

This recommendation I should note was made by the Department after it concluded that it would not be politically feasible to recommend abolition of the conference system.

In other words, independent action was the next best thing.

Would you please comment on the following testimony why mandatory independent action is not desirable:

If anything, it would seriously inhibit development and maintenance of an efficient, innovative, and economically sound ocean transportation system. Independent rate action between member carriers of a conference is totally destructive of the fundamental principles of liner conferences . . . Independent rate action does not only put a conference at risk but also potentially prejudices the interests of smaller shippers, as it is evident that the so-called independent rate action device will favor shippers who control large blocs of cargo; triggering the mechanism would be tantamount to legalizing unofficial rebating.

Answer. CMA strongly supports open conferences and a mandatory right of independent action as set out in the CMA testimony on S. 1593.

We feel competition will be a much more effective stimulant to innovation than closed conferences. Many conferences operate successfully with an open conference and independent action.

In our opinion, closed conference is much less likely to be responsive to a small shippers needs than a carrier taking independent action, since any one conference member would benefit little from a share of a small shippers volume.

Question 15. Since you were opposed to closed conferences, I take it you would not agree with the following analysis by Dr. John Roberts in support of closed conferences:

"Indeed, there is a strong case to be made that if the choice is between a system of cartels (conferences) or one of closed cartels, the latter may be preferable, even though structurally it departs more from the competitive idea. The reason for this is that the closed cartel may be able to achieve lower costs than would an open one, and even if these are not passed through as lower prices, less waste is still desirable. Thus, if 'co-operatively organized and appropriately rationalized' through capacity controls and pooling agreements, the closed conference can be expected to achieve something like minimum costs for the level of service it provides."

For the record, would you comment on Dr. Roberts' conclusion.

Answer. The primary objective of the shipping policy must be the creation of an environment which permits U.S. shippers to compete abroad, not some ivory tower concept of minimizing waste. Roberts concedes closed cartel may not pass lower costs onto shippers in terms of reduced rates.

Competition is a far greater motivation of innovation and productivity than the atmosphere of a cartel. Since the cartel may be able to protect high rate levels by limiting competition, waste may be protected rather than reduced.

CMA does not agree with Dr. Roberts conclusion.

Question 16. Those who support closed conferences maintain that conference rates are kept artificially high because if they were, independents would be attracted to the trade, and the conferences don't want that. Would you please comment?

Answer. While it is theoretically true a higher rate level could attract independents, shippers have no assurance this would provide an effective counterbalance to the monopolistic power of a conference.

An independent is not likely to immediately provide good service to the total conference operating area. The shipper has a Hobson's choice, leave the conference and pay the non-conference rate when the independent cannot provide adequate schedules, or stay in the conference.

An independent may be reluctant to take on a conference, when the conference by pooling revenues and meeting the independent's rates, could increase the independents risk in investing in the development of a service and the necessary market effort.

Question 17. (A) In your view, do conference pooling agreements, and space chartering agreements prevent or regulate competition from outsiders?

(B) Should antitrust immunity extend to these kinds of activities?

Answer. (A) Many CMA member companies have reservations on abuse by the conferences of the full range of right set forth in Section 4(a) of S. 1593. Their stated purpose is to minimize competition. Their power of concerted action could discourage competition from outsiders.

(B) CMA's position is that open conferences and independent action will provide an acceptable level of protection for shippers. CMA feels the current uncertainty of antitrust status does have an adverse effect on conference activities. We have no objection to clarifying the antitrust exemption, but only if reasonable competition is assured through open conferences and the right of independent action.

Senator GORTON. Next, we'll hear from Mr. Clifford Sayre, manager of international transportation and distribution from Du Pont de Nemours & Co.

STATEMENT OF CLIFFORD M. SAYRE, MANAGER OF INTERNATIONAL TRANSPORTATION AND DISTRIBUTION, E. I. DU PONT DE NEMOURS & CO., INC., ACCOMPANIED BY RAYMOND RIPPLE

Mr. SAYRE. Thank you, Mr. Chairman.

My name is Clifford Sayre. I'm the manager of international transportation and distribution for the Du Pont Co. I'm accompanied today by Mr. Raymond Ripple, a member of our legal department in the office of our commerce counsel.

We appreciate this opportunity to appear today and assist this committee in the important work of reforming our maritime transportation laws.

We at Du Pont share your concerns for maintaining a vital ocean transportation system—America's essential link with world markets. Du Pont has both a major and growing stake in the future of U.S. maritime policy. We are the Nation's sixth ranked exporter with more than $2 billion in export sales last year. Du Pont also is, by our estimate, the Nation's leading industrial user of ocean containers and easily one of the world's largest container users.

Because of this, Du Pont spent more than $700 million on freight transportation in 1980, with ocean transportation accounting for more than $100 million of that. The simple fact is that transportation costs and the availability of competitive and dependable ocean shipping services increasingly determine whether or not companies like Du Pont can operate and market our products abroad, especially in high-growth markets such as the Asia/Pacific and Latin American regions.

In short, we believe that ocean transportation policy is an integral part of America's international trade policy, and changes in maritime policy, such as S. 1593, cannot be addressed without considering the impact they will have on U.S. trade.

We are heartened that the Congress is reexamining our maritime policy. In our view, this is a timely and obvious extension of successful reforms in our domestic aviation, railroad, and trucking industries in the last 2 years. The record clearly shows that unleashing competitive forces in the market and reducing needless Government regulation has benefited not only the carriers but the shippers and industries they serve as well. We should never lose sight of the fact that carriers exist to serve the needs of shippers.

We at Du Pont believe that the same kind of benefits can be applied to ocean liner services.

We believe in competition. It is the necessity which makes inventors of us all. It thrives in domestic transportation, and we want to see it continue in ocean shipping.

Our interest is pragmatic. For example, containerization, the premier system in liner trade today, was but a competitive concept when first originated. Yet this competitive concept grew and brought foreign markets within reach of Du Pont and other U.S. manufacturers, facilitiating the tripling of U.S. foreign commerce over 25 years.

Innovation then extended containerization into an intermodal system. One of these systems is called in the trade minibridge and opened the Asia/Pacific Basin to Du Pont and other U.S. exporters. In reforming our ocean transport laws, we should be careful not to decrease competition which spawns these innovations. Foreign trade depends on such progressive thinking.

We believe that any effective approach to maritime reform must meet two primary goals:

First, we favor initiatives that will stimulate competition without sacrificing dependable, safe, and economic servce. Wherever possible, the marketplace should be allowed to function, and there should be less and not more regulation.

Second, we support policies that will result in a new generation of innovation, more efficient shipping systems, and new services that match the giant strides taken by U.S.-flag carriers in the past.

A current measure before this committee, S. 1593, is aimed at promoting foreign commerce and serving the interests of American marine carriers. While we applaud the bill's objectives, we have a number of reservations.

As I mentioned earlier, we believe that maritime reform legislation has to be considered in the broad context of international trade. Workable maritime legislation must equitably address the interests of carriers and shippers alike. A bill without balance—say, favoring the interests of the shipper or the carriers over the other—will penalize both the shipper and the carrier community alike in the long run. This, in turn, will translate into a national loss—lower exports and fewer cargoes—a prospect none of us can afford.

In our view, S. 1593 does too much to insure that carriers have higher profit margins and too little to insure that maritime shipping service will be adequately innovative and competitive. We also believe that the needed balance will not be achieved by shippers councils because, as proposed by S. 1593, shippers councils will not be in a position to represent the interests of individual shippers. We hope that these hearings will provide evidence of some of the uninviting consequences this bill will have on shippers and U.S. exports, if it is enacted into law as is.

We believe instead that there are several key issues which must be addressed to bring balance to this bill.

First, and most important to shippers, are service contracts. The practical experience of domestic unregulated transportation and international dry bulk and liquid parcel moves is evidence enough that service contracts work and are sufficient to establish and maintain necessary competitive forces.

We at Du Pont prefer to deal with the carrier industry on a one-to-one basis. Contracts represent a mutually agreed upon basis for conducting business. Service contracts enable shippers to commit their cargo with the assurance of adequate service and a predictable price. Carriers, on the other hand, are able to plan more efficient productive services by availing themselves of an assured stream of revenue for future expansion.

Du Pont is wholly committed to the concept of service contracts and, in exchange for cargo commitments from our carriers, we are willing to enter into contractual arrangements even on a take-or-pay basis. We at Du Pont approach world trade with a long-term view; one out of six of us at Du Pont owe our jobs to U.S. exports. We are interested in lasting agreements.

We also believe that carriers should have the right to exercise independent business judgment within the conference system. As an example, on any matter before a conference—such as rate proposals—every conference member should have the right to disagree with its fellow carriers and take independent action without fearing economic reprisal or being forced to withdraw from the conference.

In addition, we believe that the interests of the American maritime communtity—carriers and shippers alike—would be best served by retaining open conferences which promote principles of free trade and maritime innovation. It was the open conference system, after all, which brought us the great advances in increasingly efficient intermodal systems.

There are other important issues presented by this bill—shippers councils and rationalization, for example. I have appended to my oral testimony Du Pont's views on these issues and ask that they be made a part of the record, Mr. Chairman.

Senator GORTON. They will.

Mr. SAYRE. We believe that serious consideration of these matters will bring meaningful balance to this bill, acceptable to all parties.

In conclusion, Du Pont extends its continuing support to reforming our Nation's international maritime policy, and I will be happy to answer any questions this committee may have.

Senator GORTON. You attribute much innovation in recent years to the open conference system. What is the relation of containerization to open as opposed to closed conferences?

Even in a closed conference, won't each carrier innovate to reduce its costs of doing business and increase profits from the uniform conference rate?

Mr. SAYRE. I think history shows that it was a small trucking company that originated the container concept and entered the North Atlantic trade as a brand new competitor in ocean shipping. That whole new development took place in the United States. It was copied, emulated by the closed conference system when they saw its competitive value, but it was not originated by them.

I believe the closed conference system has a great stake in the status quo and that they find it very, very difficult to innovate unless they find that innovation coming from the outside.

Senator GORTON. Even for the efficiencies of a given member of that closed conference?

Mr. SAYRE. I think our experience with closed transportation arrangements in any mode indicate that they tend to keep the least efficient producer afloat, rather than trying to develop more efficient systems to serve shippers' needs.

Senator GORTON. So long as each conference member individually negotiates the division of rates with individual inland carriers, is there any problem with permitting a conference to establish uniform through rates?

Mr. SAYRE. We have no problem, I think, with the publication of through intermodal tariffs by conferences, and we do support the notion that each conference member negotiated individually.

I think our fear on the extension of conference authority inland has to do with the application of their loyalty agreements. In the appendix to my testimony I used the example of perhaps the shipper in St. Louis who, having signed a loyalty contract off the Atlantic coast, finds himself unable to use a gulf coast port or a Great Lakes port without violating the loyalty agreement. And we would be opposed to that.

Senator GORTON. You're obviously unenthusiastic about shippers councils, because you don't feel that they would represent Du Pont's interests. But of course you are, as you pointed out, one of the largest of all shippers.

Is that same defect apparent or relative to all shippers, particularly small ones?

Mr. SAYRE. Yes. I believe so.

Let me say first of all that Du Pont is a large shipper in the aggregate. We're composed of a great many business interests. For example, I'm familiar with one product line that ships perhaps 12 boxes a year to Europe—in international terms, quite a small shipper—and we must represent their interests as well.

I think we feel that the substance of most carrier/shipper conversations are specific matters of rates and services and that a shippers council is really in no position to represent us in that manner.

Senator GORTON. Would Du Pont join a shippers' council if formed?

Mr. SAYRE. If there were to be shippers' councils, I think our style is not to sit on the outside, but rather to be a participant and take part in how they might be structured and how they might operate. But we still really do not feel that they would be an effective mechanism for shippers.

Senator GORTON. Do you envision your service contract proposal as an alternative to supplant or one to supplement the loyalty contract authority provided in S. 1593?

Mr. SAYRE. I think we see it as a supplement for the whole industry. We do not see service contracts—all of our business going via the contract route. There would be a highwater mark. It would be most amenable, obviously, to those commodities and those trade lanes in which we have very large repetitive volumes of traffic.

I would emphasize, too——

Senator GORTON. It would be much less likely to apply to small shippers?

Mr. SAYRE. Not necessarily so. You and I have both had the experience of buying a house or buying a car, and we do it on a one-page sales contract. Contracts do not need to be extensive, elaborate documents. They can be. And when we say "service contracts", we mean that—we mean that to distinguish them from simply time volume rates or contract rates.

We have several maritime contracts today—some in the ocean liner industry. We believe they are legal. We believe there are inhibitions within the conferences to becoming involved in service contracts. But our contracts call for service parameters, definite transit times, and penalties to be enacted if we find it necessary to transfer our cargo from one carrier to another because of a hitch in his system.

We also have found in the bulk trades that our contracts are bankable instruments. We have a long-term contract from Australia to the United States carrying mineral sand, and that contract has a 15-year duration and was the basis for the financing of the ships to carry that cargo. So we see it as a very valuable instrument, both for the carrier community and for the shipping community, and I believe it would be applicable to small shippers as well as large shippers. It would perhaps be a less elaborate contract.

Senator GORTON. How does this proposal relate to the requirement of filing tariffs with the Federal Maritime Commission? If that were to be abandoned, would it make this issue moot? And do you feel that a purpose is served by the filing and enforcement of tariffs with the Commission?

Mr. **Sayre**. Let me try to respond completely to that question. There really are several questions there.

First, let me say that I believe where we are today is analogous to where we were several years ago when the Interstate Commerce Commission had said it was perfectly acceptable for the railroads to propose contracts for their shippers. And yet the movement on contracts was extremely glacial until we got the clear legislative mandate that is in the Staggers Rail Act.

So while contracts are certainly in existence today, there is an inhibition there, particularly on the carrier's side, to enter into them.

We faced that issue of filing with the contracts in the Staggers Rail Act. And while we don't really believe there is a need to make our contracts public—for example, our transportation costs, our distribution costs are about 10 percent of our costs of sales, and freight transportation is only 5 percent of our cost of sales—we don't publish our labor contracts, we don't publish our raw materials contracts. Neither do our competitors. We don't see why people have to know what your transportation prices are in order to compete. They don't know what our labor costs are; they don't know what our raw materials costs are.

They have good ways of determining whether price is appropriate, because the customer very shortly tells you whether your price is right.

So I would say that—if the filing requirement were to persist, I think we would say that there should be some minimum information that should be filed with the contract. On the other hand, we don't see the necessity of filing tariffs, and I honestly think it is an outmoded system.

Senator **Gorton**. Would you say that that opinion either is or should be shared by small shippers?

Mr. **Sayre**. The NIT League statement, I think, made clear today, that the majority of shippers favor the filing of tariffs. But I think it has proven to be a security blanket for transportation managers who can point to the items in the tariff and say, "My rate is lower than that, or I can negotiate to the lower rate that is in the tariff." It is a crutch, I believe.

Senator **Gorton**. I should like to thank you very much. This was a most enlightening set of testimony, and we appreciate it.

As you know, Senator Inouye will have some questions for you in writing, and I suspect we will as well. We would appreciate your responding.

Mr. **Sayre**. We'll be happy to respond to those and work with your staff in any way.

[The appendix referred to follows:]

APPENDIX

Additional Comments on S. 1593

Shippers' councils, conference membership, intermodalism, rationalization, and antitrust immunity are major issues in current maritime legislative efforts.

Du Pont's views on these issues follow:

Shippers' councils

We do not believe that shippers' councils will be effective in countering the bargaining strength of carrier conferences. Section 4(c) (1), (2) and (3) of S. 1593 limits the activities of shippers' councils to general rate levels, rules, practices, or services. Pragmatically, the predominant topic of shipper conference dialogs is specific rates or service. Consequently, shippers' councils could never represent or protect the interests of individuals shippers. Even when addressing general subjects, it will be difficult to develop a strong community of interests among shippers because of a diversity of interests.

In our opinion, adequate protection for shippers vis-a-vis the strengthened conferences envisioned by S. 1593 could be achieved by:

A clear legislative mandate for shippers to enter individual contracts with carriers. This mandate currently exists in domestic truck and rail transportation regulations. Contract carriage in conjunction with common carriage is consistent with the S. 1593 objectives of encouraging commercial solutions with a minimum of government involvement.

The right of independent action for conference carriers to (a) execute individual contracts with shippers, (b) respond to a written shipper proposal that has been rejected by a majority of the conference members, (c) establish intermodal rates.

Conference membership

S. 1593 permits conferences to limit membership (Section 4) provided any limitation is based on commercially reasonable criteria (Section 5). Presumably, using "commercially reasonable criteria," a conference could turn down an application by a U.S. flag carrier to participate in U.S. trade.

Du Pont favors open conferences. Landbridge and containerization, major maritime innovations, are products of an open conference system. Letting conferences decide whether they will be "open" or "closed" will eventually hinder competition among carriers and will, more importantly, stifle innovation.

Intermodal activities

We agree with the intent of Section 4 in S. 1593 on the subject of intermodalism. However, we are concerned by the power of conferences extending their jurisdiction inland. It is conceivable that a Midwest shipper which has signed a loyalty contract with a North Atlantic conference would find himself unable to use a Great Lakes or a Gulf port. Therefore, conference carriers should have the right to act independently when engaged in intermodal activities, and loyalty agreements should exclude, or leave to shipper's option, the inland portion of an international shipment.

Rationalization

Section 4 permits carriers to rationalize their services and establish revenue and cargo pools. We oppose blanket authority for carriers to enter into such agreements which will lessen a shipper's ability to make a choice between carriers in a competitive marketplace. If rationalization must be permitted, the need for adequate shipper protection, permitting contract carriage, and allowing conference carriers the right to exercise independent action in response to a shipper's need are even more acute.

Antitrust immunity

S. 1593, Section 8 provides carriers with a broad immunity to antitrust laws. While we are in favor of the stimulation of competition which is generally promoted by the application of the antitrust laws, we recognize that ocean carriers operate in an international environment that is, in general, contrary to our national antitrust philosophy. Therefore, we support Section 8 of S. 1593, assuming that its provisions do not exempt activities which would restrict non-conference competition. We suggest, however, that antitrust immunity not be extended to situations where the carrier's conduct restricts competition or has a direct and substantial effect on trade or commerce within this country.

A mandate for shippers and carriers to enter a contract carriage relationship and the right of conference carriers to act independently when responding to a shipper's proposal would ameliorate the anti-competitive effects of any antitrust immunity.

Other comments

The right of non-conference carriers to continue to participate in U.S. trade should be supported.

Section 7 (Loyalty Contracts) (a)(4) states in the last sentence ". . . the burden of proof shall be on the contract shipper." This reverses The Shipping Act of 1916 which does not put the burden of proof on the shipper. No showing has been made which would necessitate such a dramatic change in burdens. Du Pont feels the burden of proof should always be on the party making the charge, as in Section 6(c) of S. 1593.

We see no reason to delete the language "contrary to the public interest" from the present Section 14(b) of the Shipping Act as proposed in Section 6(b) of S. 1593.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. S. 1593 provdes that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory", or (II) "detrimental to the commerce of the United States."

Do you believe these two standards are sufficiently clear and precise so that shippers will readily know their rights under the law to file timely protests with the FMC; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. We believe the standards are sufficiently broad and clear based upon existing precedents under the Shipping Act. In addition, we do not see any real need to delete the standard "contrary to the public interest" that appears in the current law.

Question. (A) Would "contract carriage" agreements be exempt from the antitrust laws under S. 1593 and S. 125?

(B) If not, should they be?

Answer. We do not believe that service contracts should be exempt from the antitrust laws. The reasons for regulatory protection and antitrust exemption are not present in the contract carriage situation. Indeed, we believe that the common law of contracts should apply to these relationships, and the transaction should not be subject to the Shipping Act.

Question. Those who support closed conferences maintain that conference rates are not kept artificially high because if they were, independents would be attracted to the trade, and the conferences don't want that.

Would you please comment?

Answer. The statement has merit provided the legislative environment of the countries served by the closed conference encourage nonconference participation. Shippers have concern for a situation in which the legislative environment precludes nonconference activity. Rates in those situations could very well become excessive.

Question. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conference. In many cases, however, the FMC has still approved them under its section 15 authority, and they have thus received immunity from the antitrust laws.

Should this continue to be the case?

Answer. Antitrust immunity and rationalization can be powerful instruments for conferences, and should not be used to stifle competition. Du Pont urges that a revised Shipping Act should include a strong and clear statement that carriers who do not choose to be members of a conference have a right to participate in U.S. trade.

Question. (A) In your view, does the Shipping Act now permit the FMC to authorize "contract carriage" agreements, such as the time-volume discount?

(B) If "contract carriage" agreements are to be permitted, should they have certain safeguards to assure they are available to all carriers who are similarly situated? What should those safeguards be?

Answer. (A) Although we believe that the current Shipping Act does not prohibit full service contracts, we have found reluctance on the part of ocean carriers to enter into this type of agreement absent a clear, positive legislative mandate. This is very similar to the situation we faced in the rail industry prior to the passage of the Staggers Rail Act.

(B) Service contracts should remain a private transaction between the shipper and the carrier/conference who are parties to the agreement, subject to existing legal restraints.

Question. You recommend that legislation mandate that shippers enter into individual contracts with carriers, i.e., contract carriage.

Do you mean that the legislation should prohibit contract carriage arrangements between conferences and individual shippers?

Answer. No. Although it is likely that most agreements will be between shippers and carriers, it is possible that shippers and conferences may wish to enter into such contracts.

Question. Would you please supply for the record your views on the suggestion of the National Industrial Traffic League that as an alternative to shippers' councils, shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

Answer. Any provisions for shippers' councils should provide for flexible associations of shippers of similar interests. Existing trade associations should be able to negotiate with carriers/conferences under appropriate antitrust exemptions. Each shipper must retain its right to consult with carriers on an individual basis.

Question. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. Rate decreases in most instances are initiated by a single shipper on a particular commodity, and the number of shippers exporting the same commodity is relatively small. We think that the requiring advance notice would be unfair to the shipper who must have immediate action in response to market demands. Very frequently foreign trade can be lost to·other countries because a U.S. exporter could not get immediate rate relief. U.S. international commerce can not afford to lose the flexibility of immediate effectiveness of rate decreases.

Question. Should independent ocean freight forwarders be licensed by the FMC?

Answer. We do not oppose licensing of independent ocean freight forwarders (IOFF) to protect the shipping public, especially small shippers. IOFF's have traditionally lacked any need for capitalization, which could create some risk for some shippers which entrust their cargoes to these forwarders.

Question. U.S. carriers, U.S. ports in the Northeast, and on-shore maritime labor are suffering because shipments of cargo from the United States which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates which would be illegal in the U.S. from an ocean carrier who picks up or discharges such cargo at a Canadian port.

Should a carrier be required to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. We have not fully assessed this particular situation. However, as a general proposition, we do not see the necessity of any carrier filing tariffs.

Question. Should the activities of nonvessel operating common carriers be exempt from the antitrust laws; or should they be treated differently than ocean common carriers?

Answer. Antitrust immunity is intended for a group of carriers acting within a conference our under a rate agreement. NVOCC's operate independently of each other and, to the best of our knowledge, have not campaigned to be able to form a conference-like organization. Therefore, they should not be extended antitrust immunity but should be treated the same as nonconference vessel operating common carriers.

Question. Do you believe that exempting from the antitrust laws only those shipper loyalty contracts that comply with the requirements of the bill, as S. 1593 provides, might have a "chilling" effect on their use?

Since the FMC would not have to approve these contracts before they went into effect, parties would implement them at their peril, and they might be reluctant to take the risk?

Answer. We suggest that if this bill's objective is to promote trade, it should provide for tempered sanctions for those who have entered into such agreements in good faith but where the arrangement does not meet all of the requirements of Section 7. In most cases, a cease and desist order should be adequate to ensure compliance.

Question. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. Although this question can probably be answered more thoroughly by carriers and the FMC, we believe that if Congress reduces these reporting procedures Congress can still make clear its policy regarding rebates. Ultimately, the best safeguard against such practices is fair and equitable enforcement.

Question. Should NVOCC's be relieved of their present obligation under the law to file tariffs?

Answer. We see no special circumstances to exempt NVOCC's from filing tariffs if vessel operating carriers are required to do the same.

Question. From the shipper's point of view, would a mandatory right of independent action sufficiently offset what you perceive to be the adverse effects of closed conferences?

Answer. Although it would be helpful for carriers in a closed conference to have the right of independent action, it would not solve all of the problems of the closed conference system. Du Pont favors open conferences to ensure competition and an environment for innovation. The right of independent action for conference carriers in responding to a shipper's request which has been rejected by the conference majority should be allowed because we believe carriers should be allowed to exercise business judgment regardless of the position of fellow conference members.

Question. A few years ago a study done by the Department of Justice recommended open conferences and a statutorily mandated right of independent action.

This recommendation I should note was made by the Department after it concluded that it would not be politically feasible to recommend abolition of the conference system.

In other words, independent action was the next best thing.

Would you please comment on the following testimony why mandatory independent action is not desirable:

If anything, it would seriously inhibit development and maintenance of an efficient, innovative, and economically sound ocean transportation system. Independent rate action between member carriers of a conference is totally destructive of the fundamental principles of liner conferences . . . independent rate action does not only put a conference at risk but also potentially prejudices the interests of smaller shippers, as it is evident that the so-called independent rate action device will favor shippers who control large blocks of cargo; triggering the mechanism would be tantamount to legalizing unofficial rebating.

Answer. Independent action should be qualified by allowing its use only when a carrier wants to respond to a shipper's request which has been rejected by the conference majority. Such action should help small shippers as well as big shippers. It cannot upset the mechanism of the conference because the conference does consider the proposal before a carrier can exercise any action. Under these circumstances, carriers should not be denied the right to exercise individual business judgment.

Question. Since you were opposed to closed conferences, I take it you would not agree with the following analysis by Dr. John Roberts in support of closed conferences:

"Indeed, there is a strong case to be made that if the choice is between a system of cartels (conferences) or one of closed cartels, the latter may be preferable, even though structurally it departs more from the competitive idea. The reason for this is that the closed cartel may be able to achieve lower costs than would an open one, and even if these are not passed through as lower prices, less waste is still desirable. Thus, if 'co-operatively organised and appropriately rationalised' through capacity controls and pooling agreements, the closed conference can be expected to achieve something like minimum costs for the level of service it provides."

For the record, would you comment on Dr. Roberts' conclusion.

Answer. The statement could be used to justify any monopoly or international cartel. We believe that the benefits mentioned can be achieved through the marketplace without fear of cartel abuses.

Question. (A) In your view, do conference pooling agreements, and space chartering agreements prevent or regulate competition from outsiders?

(B) Should antitrust immunity extend to these kinds of activities?

Answer. A. These activities tend to regulate competition, the pooling agreements more than space chartering. The latter is fairly innocent if for a short term and in response to a sudden surge of business. Pooling can be anticompetitive not only to "outsiders" but also to the more efficient conference carriers.

(B) If foreign flags in U.S. trades are involved in these activities, it would be unfair to U.S. flags not to extend the same ability, but the immunity should be very specific.

Question. If the requirement to file tariffs were removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. Although there may be a period of adjustment, we do not anticipate strong adverse consequences from removal of the tariff filing requirement. Removing the requirement to file does not mean the elimination of tariffs. We believe tariffs in one form or another (hopefully simplified) will always exist, just as price lists exist in most industries. As service contracts become more commonly used, the need for tariffs and their filing will be proportionately reduced.

Senator GORTON. That concludes the hearing for today. We will meet again for the third of the series tomorrow, same time, same place.

[Whereupon, at 11:25 a.m., the hearing was adjourned.]

SHIPPING ACT OF 1981

THURSDAY, SEPTEMBER 24, 1981

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON MERCHANT MARINE,
Washington, D.C.

The subcommittee met at 9:40 a.m. in room 235 of the Russell Senate Office Building, Hon. Slade Gorton (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. The committee will please come to order.

This is the third in a series of three hearings on the Shipping Act of 1916. There may be other members here later on during the course of the hearing. Senator Inouye did have a short opening statement which I will read into the record:

> As the subcommittee concludes the hearings it has scheduled on S. 125 and S. 1593, I wish to commend our distinguished Chairman. With one important exception, we have heard from all segments of the maritime industry, including our trading partners. Their testimony will greatly assist the subcommittee in our effort to recommend the best legislation possible.
>
> While I can appreciate the difficulty of reconciling the diverse views within the executive branch, I would hope that the administration will submit its testimony soon. These hearings have reemphasized the seriousness of the problems created by our outmoded laws, and the need for urgent corrective legislation.

I can only say that I share the sentiments of Senator Inouye in that respect, and we do expect to hear from the administration in the reasonably near future.

We have a large number of witnesses to speak to us today. We will, of course, include their written testimony in the record in full. And we would appreciate each of you as witnesses in limiting your oral comments to the maximum extent possible.

I shall also have to say at the beginning of this hearing, that it is highly possible that there will be rollcall votes called during the course of the hearing. So this is another reason for which I hope you will keep your formal remarks here relatively brief. We'll start with Mr. Henri Blok of the Latin American Pacific Coast Conference.

STATEMENT OF HENRI BLOK, CHAIRMAN, LATIN AMERICAN PACIFIC COAST CONFERENCE

Mr. BLOK. Mr. Chairman, my name is Henri Blok, and I am chairman of the Latin American Pacific Coast Steamship Conference, executive administrator of section "A" of the Pacific Coast River Plate Brazil Conference, both headquartered in San Francisco, which positions I have held since 1969.

Additionally, I am secretary of two Pacific coast freight agreements serving the trades to and from the Indian subcontinent. Unfortunately, time did not permit to obtain their authority to speak on their behalf as well, but I feel sure that they would endorse the testimony that I am giving today.

I am indeed most grateful to appear today before your committee on behalf of these conferences, and I hope we can be of some assistance in the complex fields of maritime regulatory reform.

To that end, I have made available to your staff a written testimony prepared in consultation with counsel which, in substance, is strongly supportive of S. 1593.

It may be appreciated that my position as a conference official is somewhat different from that of other witnesses which have appeared before you. Flags of many nations are represented in our organizations and slightly different views among the member lines as to the most appropriate regulatory remedies are almost inevitable. Nevertheless, there is no question about the unanimous enthusiasm for the complete removal of antitrust exposure for conference activities. Equally so for the permissible conference jurisdiction over intermodal arrangements, and lastly for improved conditions governing loyalty contracts.

In our prepared testimony we have made certain suggestions which we believe will help in accomplishing the stated goals contained in the chairman's introductory remarks, and I urge the committee to review these suggestions particularly related to loyalty contracts. The only particular difficulty we have with S. 1593 relates to cargo classified as neobulk. Its definition appears to us to be so conceivably vague that 50 percent of the tonnage we carry today would effectively be removed from our loyalty contracts, making the latter virtually inoperable. If the neobulk is intended to cover large individual shipments, it should clearly identify the minimum tonnage from one shipper which general cargo liner vessels would have normally difficulty to accommodate.

I suggest, Mr. Chairman, such minimum to be 25,000 tons. Such a clearly defined exception will save countless dollars in ligitation, which the present definition certainly would invite.

In conclusion, Mr. Chairman, I would once again express my appreciation for the opportunity for conference officials at large to be heard. Were it not for the somewhat short notice of these hearings, I am sure that others would have wanted to be here, notably Mr. Donovan Day, chairman of the Pacific Westbound Conference, who had intended to join me, but had a prior commitment this week in the Far East.

Any question you may have, I will be pleased to answer to the best of my ability, although I will do so strictly as an individual conference official and not on behalf of the members of the conferences that I represent.

Senator GORTON. We understand that fully, but we do hope that you can help us with a number of questions.

You have succinctly identified the two most pressing problems S. 1593 addresses as, first, the exposure to antitrust sanctions in addition to the shipping penalties under the judicial interpretations of the *Carnation* and *Sabre* cases, and, second, the presumption of unapprovability resulting from the *Svensk* decision. All who have come before us have agreed that both of these court-made doctrines should be overruled by the Congress.

But going beyond that, would conferences, generally, in your opinion, still support the bill if it required conference membership to be open?

Mr. **Blok**. Oh, yes, sir, we would.

Senator **Gorton**. Would conferences generally still support the bill if it mandated every conference provide its members with the right of independent action?

Mr. **Blok**. If it were a mandatory right of independent action, no, sir, we would not.

Senator **Gorton**. Could you explain that answer?

Mr. **Blok**. The rights of independent action may or may not be of considerable assistance, as it has shown to be in a number of trades where it commercially was arrived. I think it should stay that way. It should indeed not be mandatorily imposed on every conference serving the United States, where it is definitely not in their interest to have this imposed upon them.

Senator **Gorton**. Would conferences generally still support the bill if it did not authorize conferences collectively to negotiate the division of intermodal through rates with inland carriers?

Mr. **Blok**. This is part of a very important provision that I understood the committee was in support of. We feel it is a very, very strong aspect, as we told you before, that we would very strongly support. If you were to delete that particular portion, there are still obviously other areas, particularly antitrust exposure itself, which are worth supporting.

Senator **Gorton**. Each of these questions, of course, doesn't indicate the views of the members of the committee, necessarily, but are simply suggestions from other perspectives which have been made during the course of the hearings.

Mr. **Blok**. It would be a matter to me of watering down what is really trying to be accomplished here as proposed, and the extent of this watering down, of course, can reach a point where conferences would be no longer interested in supporting it. And that particular facet alone, although very important to us, would not in my opinion necessarily remove the support of conferences.

Senator **Gorton**. Let's agree that the bill should be clarified to insure against the *Sabre*-like retroactive application of antitrust penalties for the violation of prohibited acts and that sections 8 and 12 will be changed accordingly. On those assumptions, should we go a step further and eliminate the proscriptions of section 12 relating to adherence to tariff rates, to unreasonably high or low rates, to prejudicial rates and the like?

Mr. **Blok**. I don't think I fully follow your question, sir. Would you state it again?

Senator **Gorton**. Surely. Should we eliminate the prohibitions which section 12 includes relating to adherence to tariff rates, to unreasonably high or low rates, to prejudicial rates and the like? In other words, should we free up those areas as well?

Mr. **Blok**. I think that would be to our advantage; yes, sir.

Senator **Gorton**. Why, and what would the effect be?

Mr. **Blok**. Well, whether rates are unduly low or unduly high is a very nebulous question. In many respects conferences may in general have a rate structure that has produced a good cargo flow, and at some time in the future, 2 or 3 years hence, someone will be able to make a case through court proceedings, if not through the FMC, and will be able to sway the courts that these rates were, in fact, too low. The penalties, I think, would be too severe, particularly because these rates, these type of rate structures were accomplished and provided by the conferences in full expectation that they were doing so within the law.

It is particularly these nebulous areas which ultimately come home back to roost and really not with an intent to violate the law, as such.

Senator GORTON. Well, let's assume that under those circumstances we effectively had the Federal Maritime Commission out of the filing business entirely, would a conference nevertheless find it useful or necessary to publish tariff rates and to require its own members to adhere to these published rates?

Mr. BLOK. Very definitely.

Senator GORTON. How would such adherence be enforced under those circumstances?

Mr. BLOK. They certainly would be enforced by the additional policing situation that every conference has to operate under, statutorily required by an extensive Federal mandated regulation. We have independent neutral bodies that are very stringent.

Senator GORTON. Would conferences engage the same sort of independent neutral bodies for purposes of self-policing, even if the law didn't require them to do so?

Mr. BLOK. Well, then you have to now look at that retroactively. As of today, it is a matter of fact that these things exist. In my personal opinion, if we were to set the clock back, I do not believe that many conferences would automatically do away with the existing neutral body situation as they exist now today.

Senator GORTON. So you think they would continue?

Mr. BLOK. They would continue.

Senator GORTON. If we required independent carriers to submit to the same policing authority as conference carriers, wouldn't the independents be legitimately concerned about the confidentiality of their records?

Mr. BLOK. I doubt this very seriously, because our records of individual conferences are equally confidentially treated by the neutral body. In other words, for instance, we would have absolutely no idea what the neutral body findings would be in a trade that would be directly competitive with the trade on the Pacific coast, and it may well be, particularly in my case, it happens to be the same neutral body.

These records are very confidential and are treated as such, and we have absolutely no way of finding out through the neutral body or that the neutral body would make available any such records at any other conference, except the conference that it polices.

Senator GORTON. How would the proceeds from penalties imposed by the policing party be distributed? Can they be distributed fairly or could they?

Mr. BLOK. With respect to conferences, sir?

Senator GORTON. Yes.

Mr. **Blok**. Yes. There are a number of different formulas. If I may so, in our particular case, any penalty that is collected is distributed among members, except, of course, the accused party and the guilty party, in direct proportion to the contribution of each line toward the program.

Senator **Gorton**. How would that apply to independents?

Mr. **Blok**. What would have to be done with the penalties, you mean?

Senator **Gorton**. Yes.

Mr. **Blok**. That is a good question. I don't think the conference, as such, would have anything to do with that. Perhaps these penalties would have to go direct as a collection to the Federal Maritime Commission. This is just a thought. I really haven't given it that much thought, actually.

Senator **Gorton**. That at least is something that the independents would be concerned with.

We have a number of further questions, but we will have to go on. If we can, we would submit them to you in writing. And Senator Inouye also has a number of questions which we would like to submit to you in writing and hope that you will be willing to reply to them.

Mr. **Blok**. Absolutely, sir.

Senator **Gorton**. Thank you very much, Mr. Blok. We appreciate your help.

[The statement follows:]

STATEMENT OF HENRI P. BLOK, REPRESENTING PACIFIC COAST-LATIN AMERICAN FREIGHT CONFERENCES

Mr. Chairman and Members of the Committee, my name is Henri Blok. I am and for the past dozen years have been the Chairman of the Latin America/Pacific Coast Steamship Conference and Executive Administrator of Section "A" of the Pacific Coast River Plate Brazil Conference, both headquartered in San Francisco; and it is as representative of those two shipping conferences and their member lines, identified in the Appendix to this statement, that I appear today and submit these comments.

In conjunction with other Pacific Coast-based Conference Chairmen I have appeared before your Committee in earlier years, on earlier legislative measures, and it is my great privilege to appear here today, with respect to the very important S. 1593. It is my understanding that the Committee will concurrently be considering S. 125, a reintroduction of Senator Inouye's S. 2593 of the last Congress, and many of the points I will make here will have equal applicability to concepts contained in that earlier legislative measure. Because however we did submit detailed commentary specifically on S. 2585, a year ago, I wish to focus in this testimony on the new S. 1593.

Although as will appear we have some trouble with certain specifics of the Bill, overall these Conferences strongly support it, appearing as it does to address skillfully a great many of the serious problems which today plague the international liner community serving the United States. These comments do no seek to address all of the changes contemplated in S. 1593, but rather focus on those which we consider the most critical.

I would emphasize at the outset, as has been done in prior appearances of myself and other Conference Chairmen before Congress over the past several years, the absolute necessity of correcting the aberration and manifest injustice currently plaguing the U.S. conference liner industry, by reason of the duplicative exposure to the full force of the U.S. domestic antitrust laws, on top of the pervasive regulatory system of the U.S. Shipping Act. From last year's action by this Committee on Senator Inouye's S. 2585, we know that you are aware of the problem, which we here cannot over-emphasize. The total incompatability of the U.S. Justice Department's parochial approach of domestic antitrust precepts to what is truly and necessarily an international industry based on principles of commercial collectivity is overwhelmingly apparent, to anyone who will look with an unbiased eye. The grievous injury being done to the liner shipping industry, in the United States, as a result of the commingling of these two quite alien philosophies, is equally clear, to those who but look. Of the many points addressed by S. 1593, and the several points which we will address here, the damage done to the effective operation of our nation's trading activities, our steamship companies, and our commercial and diplomatic relations with our *vital free-world trading partners by the infusion of this* antitrust philosophy is in our view far and away the most critical and crippling problem, for which legislative relief simply must be given.

IMMUNITY FOR THE ANTITRUST LAWS

As you know, the antitrust difficulties currently faced by liner companies electing to join into conferences in the U.S. trades are twofold: First, the exposure to antitrust sanctions in addition to Shipping Act penalties, under the judicial interpretations of *Carnation*[1] and *Sabre Line;*[2] second, the "presumption of unapprovability" given to shipping arrangements and agreements required by present law to be filed for approval under Section 15 of the U.S. Shipping Act, as the result of the active intervention of the Antitrust Division of the Department of Justice and the Supreme Court's *Svenska*[3] decision. Both court-made doctrines must be legislatively reversed.

We believe that S. 1593, in its Section 6, meets the second half of the problem head-on, and would effectively correct it. The removal of the antitrust-based "contrary to the public interest" language is a paramount necessity, and S. 1593 would do that. Similarly welcome is the unequivocal restatement of the intent of your Congressional predecessors respecting the burden of proof, in any "approval" proceedings. We also note with favor the requirement that the Commission act swiftly on filed agreements. Under present conditions, and largely as a result of the *Svenska* "antitrust presumption of unapprovability," protracted, costly and aimless hearings, or merely threats of such hearings, have often ultimately resulted in the abandonment of any attempts to institute worthy trade efficiencies and innovations. Indeed, the present Section 15 approval process is so cumbersome and time-consumptive that often the commercial reasons giving rise to the Agreement in the first place are moot by the time approval—or disapproval—is finally ordered. Finally, we welcome the proposal to eliminate the imposition of artificial expiry dates, today routinely imposed as a part of the approval process. We are unable to see that anyone, Federal Maritime Commission or otherwise, has derived any substantive benefit from those short-spurt approvals; while on the other hand they have caused not-inconsiderable commercial uncertainty and, at the very least, have cost the regulated industry blankets of pointless paperwork and red-tape, and countless thousands of dollars in extra legal fees.

We therefore strongly endorse Section 6 of the Bill. It does not mince words and it leaves little room for ambiguity. It will obviously be vigorously opposed by the Antitrust Division, but, as your Chairman has candidly recognized and remarked, domestic antitrust principles simply have no place in the regulation of international ocean commerce. We urge that this Section be passed as written, essentially intact.

Respecting the first half of the antitrust problem, the exposure to antitrust penalties, S. 1593 seems intended to resolve the matter, although we are not entirely certain that it fully does so. Section 8 of the Bill appears to overrule the *Carnation* and *Sabre Line* decisions. However, we feel that the Bill, as written, still leaves open the problem of retroactive application of the sanctions provided in the Bill itself, and very possibly also those under the antitrust laws, as, for a prime example, in application of the mandate of the Present Shipping Act's Section 18(b)(5), to not charge "unreasonably high or low rates." The difficulty arises because subsection 12(a)(4) of the Bill appears to read as allowing for imposition of civil penalties and reparations awards relating back to the date the lines unknowingly published what is subsequently—perhaps many years later—found to have been an "unreasonable" rate.

No clear standards have yet emerged, in the two decades since Section 18(b)(5) was put into the Shipping Act, as to just what it is that constitutes a rate "so high or low as to be detrimental to the commerce of the United States;" and we submit it is manifestly unfair to expose the carriers to the statute's heavy sanctions, or reparations—or, even riskier yet, a possible retroactive, *Sabre*-like loss of antitrust immunity—under the circumstances of some retroactive "second-guessing" of a rate decision. We trust this result is unintended; else the problem addressed by the Bill will not be solved. The far better approach is to prohibit a conference or carrier from *continuing* to assess a rate *after* the Commission, following a factual hearing, has found it to be "unreasonably high or low to the detriment of U.S. commerce." [4] The lines simply must know clearly what conduct is prohibited, and not unwittingly expose themselves to millions of dollars of penalties and damage awards for having made what later turns out to have been an incorrect rate decision.[5]

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[1] *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966).

[2] *Sabre Shipping Corp.* v. *American President Lines, et al.,* 285 F.S. 949 (SDNY 1968).

[3] *FMC* v. *Aktiebolagat Svenska Amerika Linien,* 390 U.S. 238 (1968).

Much the same retroactivity problem arises with subsections 12(a)(5) (prohibiting the charging of "unduly prejudicial" rates), 12(a)(11) (prohibiting the charging of "unjustly discriminatory" rates), and very possibly 12(a)(8). Again, these are provisions which, under today's law, are recognized as involving often close issues of fact. The present law allows a party injured by any such carrier actions to obtain retrospectively-operating reparations for violations of these provisions; the law does not, however, make them "prohibited acts," subjecting the carriers to penal sanctions.

The retroactive penal exposure problem in subsections 12(a)(4) and 12(a)(11) could be solved by replacing the present verbs "are" and "is" with the words "have been" and "has been." In subsection 12(a)(5), "are" would, in parallel with the other two subsections, be changed to "have been determined to be." This does not fully resolve the quite different issue of legitimate reparations provisions; and it is possible that additional language, closer to that of the present Shipping Act, may be necessary to cover this aspect.

If legislation such as this Bill (with the aforementioned "retroactive liability" issue solved) is enacted, solely to deal with the antitrust problem Congress will have taken a major stride toward curing the weakness of the waterborne commerce of the United States which has been so widely recognized and deplored. We enthusiastically endorse such steps.

INTERMODAL AUTHORITY

Beyond the fundamental antitrust cures, we also endorse enthusiastically the substance of S. 1593's Section 4(b), clearly authorizing intermodal arrangements, not merely between single carriers of different modes but between approved organizations of such carriers, including, on the water side, shipping conferences. It is indisputable that intermodalism is, in many of the major trades, a beneficial and viable supplement to all-water carriage. Yet if it is recognized—as it is clear this Committee recognizes—that the conference system is itself a beneficial, indeed necessary, instrument in rationalizing and stabilizing the waterborne commerce of the United States, such recognition leads inexorably to conference jurisdiction over its members' intermodal movements. Current practice and the perceived state of the law permit conferences, after Commission approval, to fix intermodal rates collectively, but require each of the surface carriers needed to complete the intermodal movement, as to respective rates. This is not only heedlessly time-consuming, but often leads to odd, uneven, and occasionally quite discriminatory results. We therefore support this change proposed by S. 1593.

We do question, however, the requirement that such intermodal arrangements between ocean carriers and surface carriers [6] be subject to the Commission's preapproval. That is not the case today, in recognition of the plain fact that the two groups of carriers are not, in such dealings, in a competitive relationship. Continuing the philosophy of the present law, it would seem only sensible that the question of how carriers in different modes divide a through rate—a matter of complete indifference to shippers—should similarly be of no concern to the Federal Maritime Commission nor within its particular expertise. We suggest that Section 4(b) not be included in the Section 5 and 6 filing and approval process, but that, instead, an additional subsection be added to Section 4(a), expressly recognizing the ability of conferences to establish intermodal rates and rate structures.

Finally, the Department of Justice is, as the Committee knows, currently in court, challenging even the limited intermodal jurisdiction now exercised by the Federal Maritime Commission, as being beyond the "Congressional intent" of the present statute. The possibility of an adverse result there should be squarely forestalled by this legislation.

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[4] With the exception of the *Sabre Line decision, alone, such procedure is the law today.*

[5] See *Federal Maritime Commission* v. *Caragher*, 364 F. 2d 709, 717–718 (2d Cir. 1966).

[6] Including, apparently, arrangements with surface carriers located in foreign countries, for transportation in those foreign countries. At the least, this presumably unintended assertion of extraterritorial jurisdiction should be deleted.

EXCLUSIVE PATRONAGE CONTRACTS.

The focal problem which the 1961 amendments were intended to resolve, by the authorization of "fair and effective" loyalty contracts, continues, notwithstanding that legislation, to be a major failing of the present Shipping Act. It is, as well, not a problem to which there are any "pat" solutions. S. 1593 proposes one possible amelioration, by authorizing a "series of spreads" as well as the existing single-spread ("dual-rate") contracts. The multiple-spread idea was rejected by the Commission some fifteen years ago, when one conference in another trade proposed it, as being in the Commission's mind something beyond the scope of Section 14b and hence impermissible as a matter of law.[7] That determination clearly should be reversed, as S. 1593 would do. The "series of spreads" may be of assistance, in some trades, and at least the experiment should be allowed. Therefore, we support the language of proposed subsection 7(a)(9).

We also support the underlying philosophy of Section 7, which eliminates the need for Commission pre-approval of any such contracts or contract systems, provided that they meet the provisions set forth in "Section 7(a)." The requirement of Commission pre-approval in the present law has, at best, resulted simply in more unnecessary paper and bureaucratic make-work—in the circumstances, which are virtually all of them, in which the Commission simply rubber-stamps the filing of its "uniform" contract. At worst, however, the present pre-approval process has a substantively harmful effect, as the antitrust-based "public interest" standard has increasingly crept into Section 14(b) as well as Section 15 proceedings, and the Commission imposes a burden of "proving why" the filing party should be entitled to utilize a loyalty contract system, a conclusion we feel confident is quite contrary to the intent of Congress, in 1961.

We understand Section 7 as not intending to preclude a conference from adding further provisions, beyond the ten enumerated, in its form of contract, provided, of course, they are not inconsistent with those ten. We urge however that this impression be made explicit. The precedent of the Commission's establishment of such a single, uniform, and invariable form of contract following the 1961 legislation is a clear indication that the same result will likely occur again, under the Bill as now written, despite the welcome absence of the pre-approval requirement. Certainly, the permission given to the Commission, in Section 18 of the Bill, carried over from present law, to "make rules and regulations. . . .," is at least an invitation to that agency to prescribe what form of contract, in its view, will not, pursuant to Section 7(b), "be treated" as a "violation of this Act." Hence the legislation must be specific on the point.

We believe the ability of conferences to experiment with additional provisions will be necesssary, if the loyalty-contract system is truly to become "fair and effective." The "series of spreads" experiment will not be a full solution for all trades; nor will the addition of a specific burden-of-proof provision, however welcome, entirely cure the troublesome "legal right to select the carrier" problem. Although we appreciate that it is unlikely your Committee will allow markedly different types of loyalty devices such as the deferred rebate system, at least some commercial leeway should be permitted, within the single type of device which is allowed. One example would be a provision permitting a conference to suspend the right of a shipper accused of breach to receive contract rates until the conclusion of the arbitration proceeding deciding the matter, with the differential being placed in escrow pending that outcome. Early in its administration of the what is now Section 14b the Commission concluded (erroneously, in our view and in the view of a dissenting Commissioner) that such a suspension would be a "penalty" and hence "impermissible" under its reading of the statute.[8]

Finally, we urge your Committee to clarify that any such loyalty devices may be applied to intermodal, as well as all-water, movements. We believe this also is legally permissible at present, as does the Commission, but the Justice Department disagrees. We suggest S. 1593 is an appropriate vehicle to affirm that such exclusive patronage agreement coverage is not only permissible, but affirmatively encouraged. The following language, as a new subsection "c" to Section 7, is suggested as a means of confirming this end:

"(c) Any loyalty contract or device may be applied to movements over joint or through routes, as well as all-water routes."

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[7] *North Atlantic Portugal Freight Conference*, 10 FMC 255 (1967).

[8] *The Dual Rate Cases*, 8 FMC 16, 36; 68–69 (1964).

"NEO-BULK" CARGOES

While, as the foregoing testimony indicates, we believe most of the important changes by this Bill are positive and forward-looking, there is one new aspect which is of great concern for these conferences. This is the inclusion in "Definitions" Section 3, subsection 3(B), of a novel and undefined category of cargo called "neo-bulk" cargo, stated as embracing commodities including, but not limited to, "forest products in an unfinished or semifinished state. . . ." Superficially this is similar to the present law's provision respecting "softwood lumber," which, under present Section 18(b)(1), is currently exempt from mandatory tariff-filing. Under S. 1593, however, such cargo, included in the broader term "bulk cargo," would also be mandatorily excluded from loyalty-contract coverage. In the Pacific Coast-Latin American trades, forest products such as described in the Bill are today carried under contract, and are an important mainstay of that contract system.

Moreover, inasmuch as, in the Bill, the reference to "forest products" is not exclusive but by way of example only, it would appear that other major moving commodities in these trades, currently under contract, would also be excluded. Metals would appear to fall within the vague and expandable definition; so also would the very important northbound movement, green coffee. Indeed, the vague definition appears expandable enough to cover virtually any commodity except fully finished consumer goods.

We do not understand why any of these "neo-bulk" commodities should be mandatorily precluded from loyalty contract coverage. Not incidentally, such commodities could easily represent a full half of the cargo moving in these conferences' trades. Under such circumstances, adoption of this exclusion would render our loyalty contracts quite useless.

The apparent attempt to limit the expansive sweep of this exlcusion, by reference to "lot size . . . too large for containers," does not appear to us to work. At least in these trades, shippers of forest products such as newsprint, liner-board, kraft-sacking, and so forth, *prefer* containerization, wherever it is offered, in order to protect the cargo from damage. Yet the shipment may often be tendered in a "lot size" too large for one container alone.

Historically conferences and individual carriers have treated commodities of the "neo-bulk" variety in special manners, in their tariffs responsive to the needs of the trade and compatible with the types of ship's equipment employed. In some trades such commodities may not today be under loyalty contract. But in other trades they are, and, we believe, mutually benficially so. We know of no reason for the wholesale prohibition of such a well-established practice, and urge that the "neo-bulk" exclusion be either eliminated entirely or carefully redrawn so as to cover as narrowly as posible only whatever perceived problem has led to its being proposed.

MANDATORY SELF-POLICING

We note in your comments in introducing this important Bill, Mr. Chairman, that your Committee wished to receive views on the issue of self-policing of independent lines. Such self-policing has been expressly required of conference carriers since the 1961 legislation (and in practical effect existent in all major trades for many years prior to that), in recognition of the limited effectiveness of any single nation's governmental policing attempts. Recently, the Federal Maritime Commission has by General Order insisted that, unless expressly exempted, all conferences must conduct their self-policing through an independent "neutral body" policing authority. Subsequent to the promulgation of that General Order, the Commission conducted a pre-rulemaking inquiry to determine whether, under existing law, it had the power to require self-policing by independent carriers, and concluded that it probably did not.

We believe that the Commission's point of inquiry was a salutory one, and that at the same time its negative conclusion was probably also correct. We believe, therefore, that Congress should affirmatively fill the gap. Rebating and other violations of law are certainly not the exclusive province of conference carriers, and the difficulties in governmental, as opposed to commercial, policing are equally applicable in the case of individual (non-conference) carriers. We therefore would propose a statutory requirement that, in any trade in which an independent policing authority exists for the conference in that trade, the independent line(s) in such trade must submit equally to the jurisdiction of that same policing authority. Although some of the policing functions will be different (eg., obviously an independent would have no conference contractual commitment to breach), much would be the same, as, for the most obvious example, rebating or otherwise unlawfully deviating from the filed tariff rates. A requirement of this sort would be but a logical extention of the legislation recently developed by this Committee and the Congress, in the so-called

"Anti-Rebating" and "Contolled-Carriers" legislation,[9] and a meaningful enforcing adjunct thereto.

CONCLUSION

On behalf of the conferences I represent, I very much appreciate being given the opportunity to comment on the very laudable efforts your Committee is undertaking to rectify the deficiencies in our country's maritime regulatory laws pertaining to our vital liner shipping industry. I would be pleased to reappear before this Committee, and to assist it further in this effort, at your call.

In this same spirit, Mr. Chairman, I would be happy to answer any questions you or your Commission might have, concerning the views expressed here. Even though much of the research and preparation of this testimony has been provided by our legal counsel. I will endeavor to contribute, from a practical point of view, whatever I can.

Appendix

PARTICIPATING CONFERENCES/MEMBER LINES

Latin America/Pacific Coast Steamship Conference

- Argentine Lines (E.L.M.A.)
- Barber Blue Sea Line
- Canadian Transport Company, Ltd.
- Canadian Westfal Larsen Ltd.
- Delta Steamship Lines, Inc.
- Empremar
- Flota Mercante Grancolombiana, S.A.
- French Line
- Hapag-Lloyd A.G.
- Intercontinental Transport (ICT) B.V.
- Lauritzen-Peninsular Reefers, Ltd.
- Lloyd Brasileiro
- Scan Pacific Line
- United States Lines, Inc.
- United Yugoslav Lines

Pacific Coast River Plate Brazil Conference

- Argentine Lines (E.L.M.A.)
- Canadian Westfal Larsen Ltd.
- Delta Steamship Lines, Inc.
- Lauritzen Lines
- Lloyd Brasileiro

[The following information was subsequently received for the record:]

Questions of Senator Inouye and the Answers Thereto

Question. Do you believe the dollar level in S. 1593 for bonding of freight forwarders and non-vessel operating common carriers is too high? too low?

Answer. In Public Law 89-777, Congress required that passenger vessels serving the United States must establish financial responsibility for death or injury to passengers or other persons in an amount calculated on passenger accommodations, as follows:

$20,000 for each passenger accommodation up to and including 500; plus
$15,000 for each additional passenger accommodation between 500 and 1,001; plus
$10,000 for each additional passenger accommodation between 1,001 and 1,500; plus
$5,000 for each passenger accommodation in excess of 1,500.

In the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970 (84 Stat. 97), Congress required the owner or operator of every vessel over 300 gross tons, serving any U.S. port or navigable water of the United States, to establish financial responsibility respecting clean-up costs from discharge of oil into U.S. waters in an amount equal to $100 per gross ton, up to a maximum of $14,000,000.

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[9] P.L. 95-483 (1978); P.L. 96-25 (1979).

In light of the magnitude of the financial-responsibility requirements of these two statutes, which, as would be S. 1593, are administered by the Federal Maritime Commission, the $150,000 financial responsibility figure posited in that bill, for ocean freight forwarders and non-vessel operating common carriers, would not, on its face, appear to be out-of-line. What is sought to be protected here is the security of freight monies, paid by the shipper and due to the ocean carrier, while in the hands of the intermediary ocean freight forwarder or NVOCC. There are probably statistics available which show the average amount of freight monies at any time in the hands of the forwarder/NVOCC and the average length of time before payment-over. The security requirement should be reasonably related to these factors; but, if it transpires, as we believe is probably the case, that the sums involved are large indeed, then $150,000 would seem entirely justified.

Question. Should legislation mandate "self-policing" by neutral bodies for all independent carriers, even if the independent's share of cargo in a specific trade is relatively insignificant?

Answer. Yes, we believe that, as stated in our prepared testimony presented at the oral hearings held by the Subcommittee, legislation should mandate "self-policing" by neutral bodies for all independent carriers, in any trade in which that requirement is imposed upon the conference carriers. The magnitude of a particular carrier's share of the market is irrelevant insofar as concerns mandatory self-policing of conference lines—for example; many of the members of the Latin American/Pacific Coast Steamship Conference are essentially cross-traders, between the United States and Europe, and are conference members in this trade only for a very small amount of cargo carried to destinations in the vicinity of the Panama Canal; yet they are subjected to the self-policing requirements just as fully as are major carriers in this (or any other) trade. There would seem to be no reason for treating the independent carrier any differently.

This is perhaps as good a place as any other to respond to a question Senator Gorton raised, during Mr. Blok's personal appearance before the Subcommittee, respecting the independent line's method of sharing in any fines assessed by the neutral bodies—and, for that matter, in any costs of the neutral body. At least in these Conferences, both of these items—expenses and sharing of awards paid by a defaulting member—are not allocated on a strict per capita basis, but are assessed by a formula which takes into account certain trade statistics. Probably the independent would be unwilling to submit similar statistics, to conference scrutiny. Accordingly, it would be our suggestion that a possible way to handle this problem would be for the independent line to participate in these costs and revenues on a per capita share basis with all of the conference lines. This would result (at least in trades such as ours) with the independent paying more (and correlatively receiving more) than some of the conference members, but less than others. The balancing of award (or potential award) with expense should remove any sense of unfairness which this might be seen as inflicting on a small-market-share indepedent.

Because it may be helpful in the Subcommittee's consideration of this entire subject of self-policing of independents, we are taking the liberty of enclosing a set of comments which were submitted on behalf of certain other West Coast conferences, in the FMC's advance rulemaking proceeding in FMC Docket 79-36, to which Mr. Blok's testimony made reference.

Question. The Committee has heard a good deal of testimony from carriers about the efficiencies of a closed conference system, and their effectiveness in combating overtonnaging, etc.

Would closed conferences be effective in this regard in our South American trades where there are government-to-government cargo sharing agreements, and bi-laterals to implement them?

Answer. The member lines of these conferences are not of an entirely uniform view on this question. Certain of them feel quite strongly that closed conferences would be definitively beneficial, on helping control the problem of overtonnaging, to which the "open conference" system makes U.S. trades particularly susceptible. At the same time, a number of the lines doubt that closed conferences alone, without a strong shipper loyalty system (such as a deferred rebate system), can ever be particularly effective. Their feeling is that, generally in U.S. trades, where the only shipper tying device is the largely unenforceable shippers' rate agreement authorized by (present) Section 14b of the Shipping Act, and where in many instances the deck seems to be rather heavily stacked in favor of the independent line, the problem is charactristically how to bring additional lines into the conference, not how to keep them out.

Question. S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory," or (II) "detrimental to the commerce of the United States."

(A) Do you believe these two standards are sufficiently clear and precise so that parties will readily know their rights under the law; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. The terms "unjustly discriminatory" and "detrimental to the commerce of the United States" are terms which have existed in the present Shipping Act since its inception. As to the first, we believe that a substantial body of case-law has adequately fleshed out its meaning that it is sufficiently clear and precise. The second phrase, although paralleling the first in duration of existence, is not in our opinion nearly as well or consistently defined in the case law, and very possibly it would be preferable to have some attempt at clarification of what it is Congress has in mind with the phrase made in the "Definitions" section of the bill.

Question. (A) Would "contract carriage" agreements be exempt from the antitrust laws under S. 1593 and S. 125?

(B) If not, should they be?

Answer. "Contract carriage agreements," as we understand the question to mean them and as the Federal Maritime Commission has interpreted them—that is, agreements whereby a carrier gives over the full reach of the vessel to one shipper (or, possibly, a very small handful of shippers)—are not currently within the ambit of the Shipping Act; nor do we believe that they would be exempt from the antitrust laws under the terms of either S. 1593 or S. 125. Nor, would it seem, should they be. Such carriage would not involve the antitrust laws' prohibitions against horizontal price-fixing, but there could be issues of "monopolization" that might legitimately be of interest to the U.S. antitrust enforcement scheme.

Question. The FMC and the Department of Justice have in the past maintained that many agreements for economic cooperation among conference members (including pooling agreements, etc.) prevent competition from carriers outside the conference. In many cases, however, the FMC has still approved them under its Section 15 authority, and they have thus received immunity from the antitrust laws.

Should this continue to be the case?

Answer. Yes; such agreements were expressly recognized as existing in 1914, by the Alexander Committee, and were expressly included in the type of agreements which the agency was authorized to approve. Moreover, as the statute has been administered by the agency, over the years, any carrier desiring to participate in a pool has been required to be included (although not always at its desired percentage share). The object of such agreements is to eliminate price competition amongst the parties to the agreement; insofar as concerns the impact of such agreements on carriers not party to them, that is one of the factors which the F.M.C. considers in deciding whether particular agreement's positive effects outweigh its perceived negative consequences. Economic conditions in certain trades make such agreements particularly appropriate, and, certainly as long as the open conference concept remains, they should continue to be allowed.

Question. Should labor unions be entitled to file complaints under the Shipping Act?

Answer. No. Any grievances which labor unions might have are totally alien to the economic regulation which is the purpose and content of the Shipping Act; and the rights, duties, protections and interests involved in labor-management problems are quite different from those involved in such economic regulation.

Question. Should the requirement in present law requiring non-vessel operating common carriers to file tariffs be retained in any legislation the Committee recommends?

Answer. Definitely—and for the same reason that "VOCC" tariffs should be required to be filed. Elimination of tariff-filing would destroy one of the fundamental purposes of the Shipping Act—to assure that all similarly-situated shippers and consignees are given identical treatment. It would, as well, eviscerate Congress's recently-passed "anti-rebating" legislation (at least insofar as concerned any independent NVOCC or VOCC), since, without the obligation to file a tariff, there would be no tariff rate from which to deviate by rebating, but, instead, the carrier could simply quote whatever rate seemed necessary to attract the particular cargo, and change such rate at will.

Elimination of the tariff-filing requirement would, for much the same reasons, literally detroy the conference system. Because the essence of the conference system is the uniform charging of agreed rates and practices, the conference members would, amongst themselves, continue to need a tariff (whether or not filed anywhere). The independent lines (and NVOCCs), on the other hand, would be entirely free to quote any rate they wished, whenever they wished, and however discriminatorily—and the conferences would be powerless even to know what those charges were. In such an imbalance of competitive edge, the conference system would surely come apart at the seams, in very short order.

In our opinion, elimination of the tariff-filing requirement would be the surest way to accomplish the U.S. Department of Justice's avowed aim, the destruction of the conference system, in U.S. trades; it would, as well, eliminate one of the principal functions presently performed by the FMC.

Question. Should any legislation the Committee recommends include without substantive change the provisions of the Maritime Labor Agreement Act which was enacted last year?

Answer. This question goes to matters beyond the purview of conferences, and hence we would prefer to withhold comment on it.

Question. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. Persuasive arguments were made to Congress, during the course of the hearings on the 1961 legislation (which first codified the requirement of mandatory tariff filing), as to why rate decreases should be allowed to take effective immediately upon filing, and nothing has happened during the intervening two decades to make those reasons any less compelling today.

It is undoubtedly true that, under this system, rate decreases will on occasion be the result of direct negotiation between a shipper and a carrier or carriers. However, once negotiated and filed, the rate is of necessity equally open to all other similarly-situated shippers. Moreover, the requirement of advance notice before once again raising the rate helps to assure that that equal availability is a reality.

It would appear, moreover, that requiring advance notice of rate decreases would result in cargoes being artificially held back, thus disrupting the regular flow of cargo movement, resulting in serious "peaks and valleys" in both trade movements and revenues to the carriers, and accordant disruption to the concept of the "regular and dependable service" which the Shipping Act and the conference system are designed to promote.

Question. Yesterday the National Industrial Traffic League suggested that as an alternative to shippers' councils, shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

What are your views?

Answer. Whether or not shippers' councils are officially recognized by new legislation—therefore, either as an alternative or as an adjunct to them—the traditional access of any shipper to carriers/conferences must be permitted to continue. We do not read the provisions of S. 1593 as intending to provide otherwise; if however there is any question on the matter, we believe the legislation should make clear that individual access, by the shipper/customer of the carrier service, is intended to remain.

Question. Later this morning the Subcommittee will hear testimony urging that the law require neutral body policing for independents, because independents have a free license to malpractice.

Do you find this to be the case?

Answer. There is no question that independent lines have a much freer hand in conducting their affairs, with far less scrutiny by their competitor lines or by the regulatory agency, than carriers joined together in a conference. We have already, in the testimony presented to your Subcommittee and elsewhere in these supplemental responses, endorsed the concept of requiring independent lines to be subjected to the same neutral body self-policing requirements as conferences in the same trade.

Question. Should the activities of non-vessel operating common carriers be exempt from the antitrust laws; or should they be treated differently than ocean common carriers?

Answer. This inquiry raises the whole question of the legitimacy of "non-vessel operating common carriers" ("NVOCCs") which act in a manner similar to Interstate Commerce Act Part IV freight forwarders but which, unlike them, were self-created by the regulatory agency, rather than by congressional act. In its dealings with the ocean carrier, the NVOCC is, and has been recognized by the Federal Maritime Commission to be, simply another shipper. Assuming that the NVOCC serves a worthwhile purpose, it does so as a facilitator of cargo movements of the underlying shippers for whom it consolidates shipments, and we can see no particular reason why those activities would be improved or fostered by collective action among competing NVOCCs—that is, by "conferences" of NVOCCs. Hence it is difficult for us to see why or where NVOCCs need or should be entitled to antitrust immunity.

Question. U.S. Carriers, U.S. Ports in the Northeast, and On-Shore Maritime Labor are suffering because shipments of cargo from the U.S. which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates which would be illegal in the U.S. from an ocean carrier who picks up or discharges such cargo at a Canadian port.

Should a carrier be required to file a tariff with the Federal Maritime Commission even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. This is a very difficult and politically-charged issue, on which far more directly-informed and directly-concerned views are presently being provided to Congress. The Latin American Freight Conferences have had no experience with this problem, as a consequence of which any substantive response by them would be largely uninformed and hypothetical.

Question. Should independent ocean freight forwarders be licensed by the FMC?

Answer. Yes. By their nature, ocean freight fôrwarders act very much in a "fiduciary" relationship, to the shippers and carriers between whom they stand as intermediaries. Prior to the enactment of present Section 44 of the Shipping Act, under which the licensing system was established, the present Federal Maritime Commission's immediate predecessor had determined that there were significant abuses rampant in the forwarding industry. Section 44, with its "fit, willing and able" standards of licensing, appears to have rectified much of this abuse, and has apparently worked relatively well, over its approximate two decades of existence. We can see no reason to abolish it at this point.

This issue is addressed in some detail in the Appendix to the CENSA testimony before your Subcommittee on S. 1593 and S. 125. We are in accord with the views there expressed.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. We have already addressed this issue, in response to another of these questions. In a word, we believe that eliminating the requirement of mandatory tariff-filing would be chaos.

Question. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (Sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship Investigation concerning the carriage of buses financed by the U.S. government on Russian vessels.

The existing provision of this Section also authorizes the FMC to require certain certifications and information from carriers, and others, regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. We are aware that the Federal Maritime Commission has commented on the apparent omission of the existing "Section 21" authority of the Commission, in S. 1593, and has recommended that it be restored, in any new legislation ultimately enacted. Although in the earlier 1960's the Commission utilized this authority in what was widely considered as an unnecessarily intrusive and "dragnet" manner, these conferences have not had any experience with it within the past decade or more. We do not, as a consequence, feel particularly qualified to comment on whether it should be retained or eliminated.

Insofar as concerns the relatively new "antirebating" legislation and its requirement of annual "certification," inasmuch as these certificates are submitted on an individual-carrier basis, we do not believe comment from a conference perspective would be either particularly appropriate or useful.

Senator **Gorton**. We'll now hear from a panel consisting of Mr. Peter Luciano, Transportation Institute; Mr. David Leff, Joint Maritime Congress; and Mr. James Patti, Maritime Institute for Research and Industrial Development.

STATEMENTS OF PETER LUCIANO, EXECUTIVE DIRECTOR, TRANSPORTATION INSTITUTE; DAVID LEFF, EXECUTIVE DIRECTOR, JOINT MARITIME CONGRESS; AND C. JAMES PATTI, VICE PRESIDENT, MARITIME INSTITUTE FOR RESEARCH AND INDUSTRIAL DEVELOPMENT

Mr. **Luciano**. Mr. Chairman, I have a fairly lengthy statement here that was prepared by Jeff Stein, an economist on our staff. I think it does a good job of laying out our position on this issue.

But in the interest of saving your time and following your opening guidance, I would like to summarize the statement and, if possible, have the entire text entered into the record.

Senator **Gorton**. Would you do that, because your entire statement will be included in the record.

Mr. **Luciano**. Thank you, sir.

Mr. Chairman, my name is Peter Luciano. I am executive director of the Transportation Institute. The institute is a nonprofit research organization, founded in 1968. Our 174 member companies operate in the Nation's foreign and domestic shipping trades.

We are here today, Mr. Chairman, to express our support for the intent of this piece of legislation that you and your cosponsors have introduced.

If I might paraphrase Voltaire, who was speaking on a very different matter at the time, if the U.S. merchant marine didn't exist, we'd have to invent one. I don't mean that flippantly.

What I mean by that is if there were no merchant marine under the U.S. flag, the U.S. Government would have to build and operate such a fleet to serve the purposes that the commercial fleet does today. I'm not recommending nationalization. That would be not in the best interests of the country.

But what we have done is to, in effect, trap ourselves in a linguistic exercise, if you will. The problem is that the words "national defense" don't appear in the term "U.S. merchant marine." And as a result, both in the budgetary process and in the other ways the Federal Government deals with the U.S.-flag merchant fleet, we are deflected from the true function that the fleet performs. And as a result the industry is treated as neither more nor less significant than the chewing gum industry or any other commercial enterprise.

And that is where the problem lies. If the merchant fleet is treated as any other commercial enterprise is, and therefore its defense significance is not adequately recognized, we will not get the results out of the fleet that we would if we were not stuck in that linguistic trap.

I think a commonly cited number is that there is perhaps a 5-percent rate of return that the average U.S.-flag liner shipping company receives on its investment. Most companies would be better off putting their money in the corner savings and loan association. And if it weren't for various historical developments, perhaps some of the companies would do just that.

The reason why that predicament exists, one which is not in the national interest, is that there is a lack of Federal Government participation. And where there is not a lack, there is frequently a negative participation, particularly, for example, on the part of the Justice Department.

Another factor in this current state of affairs is the fact that there is a lack of free trade in international ocean shipping. Therefore, in our view, free trade efforts will do little to improve the situation and reverse the standing of the merchant fleet.

We believe part of the solution to the problems of the U.S. merchant marine today are addressed in the legislation that you have introduced. We support the intent of this legislation. We particularly support the antitrust immunity provisions and the strengthening the Federal Maritime Commission in the realm of international ocean shipping jurisdiction.

We look forward to working with you and the other subcommittee members and with your very able staffs to rebuild the U.S. merchant marine to the level that we think is required by the national interests.

Thank you very much.

[The statement follows:]

STATEMENT OF PETER LUCIANO, EXECUTIVE DIRECTOR, TRANSPORTATION INSTITUTE

Mr. Chairman and Members of the Committee, my name is Peter Luciano. I am Executive Director of the Transportation Institute, a nonprofit research and educational organization, founded in 1968. Our 174 member companies operate in the Nation's foreign and domestic shipping trades. The Institute commends the Subcommittee for its efforts to revitalize the U.S.-flag maritime industry and we wish to express our general support for the bill under consideration today, S. 1593, The Shipping Act of 1981.

Since enactment of the Shipping Act, 1916, significant changes have taken place in the technology and philosophy underlying international ocean transportation. A world trend toward use of national fleets for political and economic purposes and the consequent development of national cargo allocation policies have dramatically intensified competition for available cargo. The United States is the largest trading nation in the world, yet our U.S.-flag merchant fleet carries less than four percent of this Nation's foreign commerce. Improving the regulatory aspects of United States maritime policy could be an important first step to placing our merchant marine on the path to recovery and ensuring greater participation in our foreign commerce.

The proposed measure, S. 1593, provides much needed relief for U.S.-flag vessels operating in the international commerce of the United States. It does this by easing the regulatory environment which has been a factor in effectively eliminating U.S.-flag presence on the high seas. Since the Subcommittee will be hearing from a number of companies directly affected by this proposed legislation, we will limit the scope of our comments to an attempt at an overview.

The U.S. merchant marine competes in a world market which is greatly distorted by large amounts of aid given to the various merchant fleets by their respective governments. This aid ranges from tax breaks to direct subsidies with a number of countries actually owning and operating their merchant fleets. When dealing with international shipping matters, one must be fully aware that the textbook example of a free market does not exist and therefore should have little bearing on our government's decisions in matters concerning the U.S. merchant marine.

At present, the U.S.-flag international ocean shipping industry is restricted by provisions in the 1916 Shipping Act which severely curtail an operator's ability to compete in the world market as it actually exists. U.S. operators are severely disadvantaged under the present open conference system. U.S. operators simply cannot compete with the much stronger conferences that operate in foreign trades where the right exists to limit membership and to take strong action against shippers who do not exclusively patronize conference vessels. Specifically, U.S. vessel operators are limited in the extent to which they can enter into agreements which affect conference, pooling and other activities which are common in the conduct of international ocean shipping. Entry into and operation under such agreeements are hampered by application of the U.S. antitrust laws to these activities. This is imprudent, we believe, because it forces the U.S.-flag carrier to operate under restrictions which do not apply to his competitors.

The Transportation Institute supports the initiatives presented in S. 1593. We feel these measures will help U.S.-flag operators to compete with foreign operators and renew an American presence on the high seas. The exemption of certain agreements from antitrust laws is essential if U.S.-flag carriers are to survive in today's competitive ocean shipping market. The Congress recognized this fact when in 1962 the Subcommittee on Monopolies and Commercial Law of the House Committee on Judiciary issued House Report No. 1419, 87th Congress, Second Session which stated "The Antitrust Subcommittee recognizes the unique character of the ocean shipping industry with respect to the application of the antitrust laws. No other governments inhibit their carriers by antitrust laws, and American ocean carriers must compete, not within the framework of our domestic antitrust laws but in the jungle world of ocean shipping cartels."

The U.S.-flag liner industry has experienced a decline of more than 50 percent since that Committee Report was released. Of the nineteen U.S. liner carriers operating in 1970, only nine remain. If prompt action is not forthcoming, more companies will likely disappear. Antitrust immunity is a necessary component in the industry's revitalization as it will allow our operators to compete on a more even level with their foreign counterparts.

The bill also simplifies the procedure for the formation of conferences and expedites the approval of agreements. S. 1593 establishes the Federal Maritime Commission (FMC) as the primary adjudicator in matters pertaining to international ocean shipping. We feel that the FMC is best suited for this responsibility as it was established for this purpose and is the most knowledgeable U.S. agency in the area of international shipping. Past and present interference by the Justice Department over antitrust disputes in the area of international ocean shipping has hampered the development of a strong U.S.-flag merchant fleet. In order for our fleet to grow and prosper, the FMC must be given the sole responsibility for the regulation and enforcement of matters of this nature.

The bill before you today is an important step towards the revitalization of the U.S. merchant fleet. In line with President Reagan's objectives, S. 1593 eases the regulatory burden which presently encumbers U.S.-flag operators. Any effort to renew the American merchant fleet's presence on the high seas must include removal of the regulatory impediments which now exist.

The Transportation Institute therefore supports the intent of this legislation, and we appreciate the opportunity to work with this Subcommittee and its staff, both on this piece of legislation and other efforts to restore the U.S. fleet to the status required by the national interest.

Thank you.

Senator GORTON. Thank you very much. We appreciate your endorsements.

I'll be happy to have either Mr. Leff or Mr. Patti add to this if you'd like.

Mr. LEFF. Good morning. I'm David Leff, executive director of the Joint Maritime Congress.

I, too, have prepared a written statement, which I would like submitted.

Senator GORTON. It will be included.

Mr. LEFF. This morning I would like to take just a few minutes to state why I believe these bills are so very important.

First, Senator Gorton, I would like to applaud you for your opening remarks on Monday. I think you hit the nail on the head.

Our U.S.-flag liner companies, which comprise part of our membership, operate, as you know, under rules enforced by the Department of Justice, which are simply out of place in the international shipping business.

Consequently, our companies are at a distinct competitive disadvantage. And more important, these antitrust policies of the United States, as applied to liner shipping, have a chilling effect on the development of sound business practices by our companies because they are forbidden to observe the same rules that the other players in the game play by.

And even in those instances where our Government prosecutes foreign interests for violations of our national or domestic antitrust laws, the prosecutions merely exacerbate an already bad situation

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and bring threats of retaliation from even traditional allies, such as the British, who are angered by what they perceive as a breach of comity and penalization of their accepted commercial practices.

Our trading partners reject this Sunday school morality and ignore our approach to international commerce. Moreover, sanctions against most of these alleged forbidden practices cannot be enforced against our foreign trading partners, because many of them take place beyond our borders.

So our companies are placed at a competitive disadvantage, our allies are angered with us, and the companies can still not operate with maximum good business effect because of the fear of severe monetary sanctions or prison terms.

So the system we have currently in effect, one of weak conferences, selective antitrust applicability, and limited cooperative arrangements simply does not work. In fact, it has become the worst of both worlds.

S. 1593, in our judgment changes this untenable situation and brings practicality and enlightenment to international principles. It also recognizes that the U.S. maritime industry cannot operate without regulation. The same principles that apply to the airline industry simply does not work in the liner t[illegible]

With airlines, whether you or I—or at least whether I take a trip to Europe will depend a great deal on the price of the airline ticket. But whether you or I will ship our cargo does not depend on the freight rate as much as it depends upon the availability of a market. The market is relatively inelastic. If we have to get our goods there, we're going to get them there even if it costs a little bit more.

In the short run, if we take away all tariff restrictions certainly everyone's going to go for the lower rate. But once the weaker people are out of the market or out of the shipping industry, then those rates are going to come up again. And consequently American shippers and consumers will pay higher prices in the long run than they pay right now.

I think this statement is supported by history. Between 1820 and 1860, we carried 77 percent of our own cargoes. In 1910 the figure had dropped to 9 percent. It's now 3.6 percent.

At the beginning of World War I, when foreign shipping, on which we became heavily reliant, went home, the price to ship a bale of cotton from a southern U.S. port to the United Kingdom rose from $2.50 to $60, and wheat from 5 cents to 60 cents a bushel. I would hate to see us in that same position again.

I think this bill correctly balances those two interests and gives our liner companies a chance to develop these sound business practices that they need, without fear of the Justice Department taking sanctions against them, and yet with a protected climate in which they can operate.

While we both await the administration's position on this legislation and, in fact, the administration's maritime program, S. 1593 legislatively sets forth what President Reagan said during the campaign last year, to "reduce the severe regulatory environment that inhibits American competitiveness" and to change those regulatory restrictions that "simply prevent our ships from competing with foreign ships."

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So, again, I thank you for your time and thank you for this legislation.

[The statement follows:]

Statement of David A. Leff, Executive Director, Joint Maritime Congress

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before this subcommittee on behalf of the Joint Maritime Congress. We represent over 100 U.S.-flag steamship companies engaged in nearly every form of waterborne commerce.

I intend to be brief this morning since the Subcommittee has already heard extensive testimony on both S. 1593 and S. 125. The Joint Maritime Congress shares many of the views that have been presented before the Subcommittee, so I will avoid repetition of statements already made. Instead, I plan to summarize our views.

Our liner company members participate in a variety of shipping activities and consequently are affected in different ways by different government regulations. For this reason there is not total and complete agreeement on each issue addressed by the legislation. There is, however, general agreement that innovative measures are needed to revamp our regulatory network for the health and growth of our industry.

Not only our own liner operators, but foreign operators as well, recognize the need for extensive maritime regulatory overhaul. Earlier this year the Council of European and Japanese Shipowners, better known as CENSA, whose interests differ from our own, pointed out in its selfish plea against bilateral maritime agreements—which the U.S. shipping industry so desperately needs—the unreasonable burden imposed on our own and all other shipping nations by our laws. The CENSA chairman asserted the U.S. fleet ". . . could again become viable with the aid of fiscal incentives and reform of the regulatory straightjacket that shipowners have to suffer in trading with the United States." Thus, even interests that are contrary to and competitive with U.S. interests recognize the need to free shipping from regulatory restrictions that do not exist elsewhere.

Both S. 125 and S. 1593 loosen and practically remove this so-called "straightjacket" that binds the international ocean transportation of our nation's commerce—the largest single element of world trade.

We want to express wholehearted support for legislation which would exempt the maritime industry form the antitrust restraints on authorized conference or shippers' councils activities, intermodal agreements, and loyalty contracts. The erosion of the antitrust immunity which the Shipping Act of 1916 was intended to create has severely injured the competitive position of American carriers and has resulted in uncertainty, confusion, and instability in the liner trades. Only a clear, legislative directive such as the one that makes up the core of these bills can undo the damage to the maritime policies of this country caused by intrusions of the Antitrust Division of the Justice Department under the subjective tests of the *Svenska* Doctrine.

The legislative history of the 1916 Act shows that its drafters recognized that however desirable antitrust principles may be for domestic industry, the unique needs and international nature of the shipping business make it unsuitable for the rigid imposition of those principles. The Department of Justice should no longer be empowered to prosecute authorized activities. Not only does the Justice Department's enforcement of antitrust law subject U.S. carriers to rules which foreign carriers do not have to honor and are contrary to practices in international commerce, but it places our merchant marine at a severe competitive disadvantage. The absence of a single, reliable source of regulatory policy and enforcement often stifles and sometimes paralyzes industry decision-making. The only effect of subjecting the U.S. merchant marine to antitrust laws is to enhance the position of competing foreign carriers who are able to provide shippers with the services they need with the support of, or non-interference by their flag governments.

Currently the United States applies a national mentality to our international commerce. This mentality has contributed to the uncertainty surrounding the U.S.-maritime industry's role in the U.S. foreign trade. There exists a compulsion to export domestic law, particularly our antitrust laws, to other nations. Our trading partners are stepping up their criticism of the United States' unilateral approach to its international commerce. Indeed, our trading partners have rejected our "Sunday school morality" and ignore our unrealistic approach to international commerce and, what's more, dump their excess tonnage on our lucrative trades. The overtonnaging in the U.S. trade has created a free-for-all which has completely destabilized our liner trades.

When the Shipping Act of 1916 was enacted, it was apparently recognized that the free and open competitive system was undesirable, and conferences were permitted. However, the U.S. Congress did not choose to go as far as our European trading partners by permitting a fully cooperative system either. Now it appears that our middle ground system of weak conferences, selective antitrust applicability, and limited cooperative arrangements is not working either. It can be said that the present United States system is the worst of both worlds. Improvements must be made and this legislation is a good beginning.

While there has been continued debate on the effectiveness of the FMC, the intent of this legislation is to strengthen the agency and dispel any criticism of its weakness. To that end, the Joint Maritime Congress favors an FMC armed with the regulatory authority and procedural tools necessary to rigorously enforce our country's maritime laws.

Regulatory reform would promote continued development of intermodal transportation systems by removing the uncertainty associated with the legality of ocean conferences entering into agreements with truckers, railroads, airlines, or their various rate bureaus. Furthermore, we agree with the precept that jurisdiction over these intermodal agreements should be vested in one agency to avoid delay, expense, and uncertainty of multiple proceedings in disparate Federal agencies.

Additionally, we support strengthening the FMC's subpoena and discovery powers and we endorse the provisions that permit the Commission to suspend any and all tariffs of carriers who refuse to supply information requested under the authority granted the Commission.

In light of S. 1593's advocacy of limited conference membership, we agree with the language in Section 5 which requires independent neutral body policing and gives conference members the right of independent action.

While I have purposefully avoided extensive analysis of each bill's many provisions, I want to reiterate our full support for the basic approach of S. 125 and S. 1593. I can say without a doubt that the Committee's action in this area is desperately overdue.

Regulatory reform, in and of itself, is not necessarily the panacea for the industry; it must be viewed in terms of a more broad and far-reaching maritime policy. An effective maritime program must also include promotional incentives such as bilateral cargo-sharing agreements. These agreements, which many foresee as the trend of the future, will act as a catalyst for growth of the U.S.-flag fleet. While benefiting our security interests, they will also provide our merchant marine with a more equitable share of U.S. oceanborne commerce. Whether the Committee addresses promotional issues jointly with regulatory reform, as S. 125 does, or separately at a later date, let me stress that these agreements and other promotional incentives form an integral piece of any maritime program and should be considered in a timely manner.

S. 125 and S. 1593 should improve the U.S.-flag liner fleet's competitive posture. This, in turn, will confer multiple benefits upon the economy by bringing jobs to the shipbuilding and ship-operating sectors, as well as to supporting industries. A strong fleet is more than just jobs, however, it is a direct investment in our nation's military and economic security, increasing our defense sealift capability and allowing us to carry a larger percentage of our oceanborne trade.

These bills do not, and were not intended by their drafters, to be *the* maritime program that this industry so desperately needs. Nevertheless, they are very important pieces of legislation and deserve the support of everyone who advocates and believes in the future of the U.S.-flag merchant marine.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question 1. Would you list the membership of your organization? Indicate which of your members favors closed conferences; open conferences?

Answer. The membership of the Joint Maritime Congress consists of all U.S.-flag ship operators having collective bargaining agreements with the Marine Engineers' Beneficial Association, District 1. A list of those signatory companies is attached.

During the three days of hearings on S. 1593 and S. 125, the Senate Subcommittee on Merchant Marine heard testimony from many of JMC's liner company members which, we believe, have already indicated to the Subcommittee their specific position with respect to a closed vs. open conference system. Sealand Industries, Inc., for example, favors continuing an open conference system as does Central Gulf Lines. CASO members, who are also JMC members, support a closed conference system as provided in S. 1593. Waterman Steamship Company favors a closed conference system that contains provision guaranteeing participation by U.S. carriers in each trade as outlined in H.R. 4374, Congressman Biaggi's ocean shipping bill.

PARTICIPATING MEMBERS

Lykes Bros. Steamship Co., Inc.
Moore-McCormack Resources
Apex Marine Corp.
Asbury Steamship Co., Inc.
United States Lines Inc.
Energy Transportation Corp.
El Paso Marine Co.
Trinidad Corp.
Maritime Operations Inc.
Delta Steamship Lines, Inc.
American Eagle Tanker Corp.
Transport Commercial Co.
Maritime Overseas Corp.
Sea-Land Industries, Inc.
Farrell Lines, Inc.
Central Gulf Lines Inc.
American Coastal & Foreign Shipping Co.
Ogden Marine Inc.
Amerada Hess Corp.
Keystone Shipping Co.
Matson Navigation Co.
Panama Canal Commission.
Marine Transport Lines.
Altair Steamship Co., Inc.
Amoco Shipping Co
Keystone Shipping Co.
American President Lines.
Shipco, c/o Keystone Shipping Co.
Prudential Lines, Inc.
Puerto Rico Marine Management.
West Coast Shipping Co.
Waterman Steamship Corp.

Question 2. Under present law, the FMC may approve a conference agreement for economic cooperation (including pooling) among its members even if the effect of that agreement is to prevent competition from "outsiders" in the trade. If the FMC approves such an agreement, the parties, of course, receive antitrust immunity.

Do you believe whatever legislation we recommend should give the FMC this authority, and continue the antitrust exemption?

Answer. Yes.

Question 3. Should non-vessel operating common carriers be authorized to enter into agreements for economic cooperation with other persons subject to the act, and thus receive antitrust immunity once the FMC has approved the agreement?

(A) Are non-vessel operating common carriers now permitted under the law to file "intermodal rates" or provide "through transportation", as common carriers by water?

(B) Should any legislation we recommend permit them to do so?

Answer. IMC has no position on the questions regarding non-vessel operating common carriers.

Question 4. Yesterday the National Industrial Traffic League suggested that as an alternative to shippers' councils, shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

What are your views?

Answer. Both S. 125 and S. 1593 provide for more effective communication between shippers and carriers by authorizing shippers' councils which provision we generally support. With respect to allowing some less formal mechanism, as has been suggested by the National Industrial Traffic League, we would respectively defer to the views of shippers.

Question 5. The committee has heard a good deal of testimony from carriers about the efficiencies of a closed conference system, and their effectiveness in combating overtonnaging, etc.

Would closed conferences be effective in this regard in our South American trades where there are government-to-government cargo sharing agreements, and bilaterals to implement them?

Answer. Cargo sharing agreements, such as those in effect in Brazil and Argentina, are vital to our U.S. ocean commerce. Bilateral agreements serve to combat the problem of overtonnaging in the U.S. trades which have been created by dumping excess capacity in our trades. To the extent that closed conferences are necessary in the South American trades, we would respectfully defer to the views of our member companies who service those trades.

Question 6. Should legislation mandate "self-policing" by neutral bodies for all independent carriers, even if the independent's share of cargo in a specific trade is relatively insignificant?

Answer. We support requirement for independent neutral body policing of all carriers—conference and non-conference alike—serving in the U.S. trades. Further, we would agree with provision in S. 125 which permits the FMC to dispense with the policing requirement if it found that the cost of such policing would be unduly large in contrast to the size of the trade.

Question 7. Do you believe the dollar level in S. 1593 for bonding of freight forwarders and non-vessel operating common carriers is too high; too low?

Answer. We would respectfully defer to the views of freight forwarders and non-vessel operating common carriers on the question of bonding levels.

Question 8. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(a) Do you believe any legislation we recommend should retain this authority for the FMC?

(b) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. (a) No. We believe the FMC should be allowed to continue filing special reports.

(b) Yes. We recommend that FMC's authority to require certain certifications and information from carriers in their efforts to prevent illegal rebating should be continued. If not, rate wars could ensue and weaker ship operators could be driven out of business altogether.

Question 9. Should independent ocean freight forwarders be licensed by the FMC?

Answer. Yes. We believe the current system insures that freight forwarders are both financially sound and commercially reliable.

Question 10. One of the standards for approval of agreements in S. 125 is that they are consistent with an expressed regulatory policy that "assures carriage by vessels of United States registry of a substantial portion of waterborne export and import foreign commerce of the United States in order to further both the economic and national defense goals of the Nation."

(A) Do you believe it is appropriate to include such a standard in any legislation we recommend?

Answer. Yes. It is appropriate to include such a standard in maritime regulatory legislation as a clear and precise statement of our national maritime policy in terms of our nation's commitment to foster the growth of a strong and viable U.S. merchant fleet.

Question 11. U.S. carriers, U.S. ports in the Northeast, and on-shore maritime labor are suffering because shipments of cargo from the U.S. which should naturaly be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates which would be illegal in the U.S. from an ocean carrier who picks up or discharges such cargo at a Canadian port.

Should a carrier be required to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. Yes. We strongly favor amendatory language as contained in S. 125 which would require all carriers of U.S. destined or origin cargo be subject to the filing requirements of the FMC. Such amendatory language would place U.S. ocean carriers on a more equal competitive footing in the international marketplace.

Question 12. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. As we stated in our testimony, the effects of weakening or even abolishing the tariff filing requirements of the FMC is not at all advisable. In the short run, removing all tariff restrictions would reduce freight rates by creating rate wars, but eventually as the weak companies would be driven out of business, prices would eventually rise. As one U.S. steamship operator put it before your Subcommittee, "Removing tariff filing requirements could make rebating the 11th commandment."

Question 13. Should labor unions be entitled to file complaints under the shipping act?

Answer. Yes. The right of all interested parties to file complaints should be continued, and this, of course, woud include labor unions.

Question 14. Should the requirement in present law requiring non-vessel operating common carriers to file tariffs be retained in any legislation the committee recommends?

Yes. We support the current requirement to file tariffs.

Question 15. Should any legislation the committee recommends include without substantive change the provisions of the Maritime Labor Agreement Act which was enacted last year?

Answer. Yes. JMC supported the enactment of the Maritime Labor Agreements Act of 1980 which prohibits the FMC from reviewing multiemployer collective bargaining agreements. It eliminates, therefore, FMC jurisdiction over the free and unfettered collective bargaining process in the maritime industry. Accordingly, we strongly favor inclusion of this conforming provision without change.

Question 16. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. No. We support the existing law which allows for decreases in rates to become effective upon publication and filing with the FMC.

Senator GORTON. Thank you.

Mr. Patti.

Mr. PATTI. Good morning.

My name is C. James Patti. I am a vice president of the Maritime Institute for Research and Industrial Development, an association of companies which operate U.S.-flag vessels in the U.S. domestic and foreign shipping trades.

I, too, Mr. Chairman, would like to very, very briefly summarize our prepared statement which we have submitted for the record.

Since you have already received a great deal of testimony from our member companies, as well as the other maritime organizations, I would only like to very briefly mention a few points.

No. 1, we would like to commend you for sponsorship of S. 1593 and to again express our appreciation to Senator Inouye for his consistent efforts in this field. We supported his legislation, the Ocean Shipping Act of 1980 in the last Congress, and we're sorry the legislative calendar ran out before final action could be taken on that piece of legislation.

Our member companies all agree regulatory reform in this field is long overdue. We believe the United States stands alone in its strict enforcement and regulations of the liner shipping industry, the result of which has been a decreasing share in the amount of cargo carried by the U.S.-flag liner vessels.

In 1979, our fleet carried 27½ percent, and this decreased to 26½ percent in 1980.

We strongly support the grant of complete antitrust immunity to authorized conference activities as set forth in your legislation.

We believe the application of the antitrust laws eliminates even the most basic cooperation among carriers, due to the fear of prosecution by the Justice Department. It discriminates against American carriers in the form of enforcement. As you yourself have stated, it is very easy for the enforcement to be taken against American operators and much more difficult to enforce these laws against their foreign counterparts.

We would also like to express our support for the language in your legislation which places the burden of proof on those who would challenge agreements filed with the Federal Maritime Commission, as well as the language regarding intermodal transportation agreements and the clarification of FMC jurisdiction.

We'd also like to raise just two other points. The first is the definition of common carrier by water in foreign commerce. It is our belief that the language contained in S. 125 goes a little bit further to solving the problem of cargo diversion from American ports, which we believe is a very, very serious problem, particularly in the Great Lakes.

We would also like to reaffirm our support for the language contained in Senator Inouye's legislation regarding intergovernmental maritime agreements. We understand fully your intent not to bring promotional and regulatory matters in one piece of legislation.

But we would hope, shortly after action is completed on the regulatory reform bill, that action and attention can be devoted to the promotional aspects and promotional problems of the merchant marine.

Thank you.

[The statement follows:]

STATEMENT OF C. JAMES PATTI, VICE PRESIDENT, MARITIME INSTITUTE FOR RESEARCH AND INDUSTRIAL DEVELOPMENT

Mr. Chairman and Members of the Subcommittee, my name is C. James Patti. I am Vice President of the Maritime Institute for Research and Industrial Development. The Maritime Institute is a non-profit association of International Organization of Masters, Mates & Pilots, ILA, AFL–CIO signatory companies which operate United States foreign and domestic shipping trades.

The Maritime Institute greatly appreciates this opportunity to present our views of S. 1593, the Shipping Act of 1981, and S. 125, the Ocean Shipping Act of 1981. Our comments will be of a general nature as this Subcommittee has already received detailed comments on the specific provisions in these bills from many of our member companies.

At the outset, we wish to commend you Mr. Chairman for your sponsorship of S. 1593 and your commitment to achieve a "simplified, more efficient, responsive and effective regulatory scheme for international liner shipping in our foreign trade." We agree wholeheartedly with your statement that the United States needs "to reduce Government regulation where it represents a wasteful interfence in commercial maritime transactions."

We would also like to again express our appreciation for the efforts of Senator Daniel Inouye to improve the regulation of international ocean shipping and thereby develop a stronger, more competitive United States-flag merchant marine. The Maritime Institute supported his Ocean Shipping Act of 1980 (S. 2585) and were pleased that it received the overwhelming support of the Senate in 1980. Its approval by the Senate leads us to hope that there is in fact support in the Congress for legislation which enables United States-flag vessels to compete on an equal basis in the international shipping arena.

Legislative initiatives like S. 1593 and S. 125 are essential if the United States is to harmonize its laws with "the real world" of international ocean shipping. It has been pointed out repeatedly over the years that the United States stands virtually alone in its strict regulation of the ocean shipping industry. The Shipping Act of 1916, the cornerstone of Federal regulation of international liner shipping, has simply not kept pace with the dramatic changes in the ocean shipping industry since its enactment sixty-five years ago. The natural but unfortunate and dangerous result has been a decline in the share of liner cargoes carried by United States-flag vessels. According to the Maritime Administration, United States-flag liner vessels saw their participation in our nation's export-import trade drop from 27.5 percent in 1979 to 26.5 percent in 1980.

We believe the most serious problem inherent in the existing regulatory framework is the extension of antitrust principles to the liner shipping industry. Consequently, we strongly support the fundamental principle embodied in S. 1593, namely a grant of complete antitrust immunity to authorized conference activities.

The record compiled by this Subcommittee is replete with examples of the negative impact and disruption caused by the application of American antitrust laws to international liner shipping operations. Vessel operators are hesitant to cooperate even in the most limited ways for fear that their actions will nonetheless be attacked by the Justice Department and they will be liable for criminal penalties and treble damages. Shipping stability and efficiency is therefore sacrificed to avoid the threat and risk of prosecution.

Similarly, the application of our antitrust laws is a serious impediment to the revitalization of the United States-flag merchant marine. These laws are much easier to enforce over American carriers than over their foreign counteparts. As you pointed out Mr. Chairman, "foreign carriers can make arrangements or concessions to improve their competitive position, often by providing shippers outside of the United States with benefits on routes other then those to or from the United States."

Finally, the current application of the antitrust laws inhibits the rationalization of sailings and formation of joint services by United States-flag carriers. This is a serious handicap confronting the American fleet in that it prevents our fleet from achieving the same pricing and cost benefits that foreign carriers derive from rationalization. Eliminating the antitrust inhibitions to rationalization should result in a more coordinated use of facilities, vessel space, equipment and terminals; a more efficient system of port calls; and a reduction in capital and operating expenses.

While we and others have testified in support of the proposal to grant antitrust immunity to shipping activities, we recognize that the advocacy of free competition in the open market is deeply engrained in America's political and economic policies. We similarly understand the concerns of those who believe that the enforcement of antitrust principles is essential to the furtherance of competition. However, we also believe that the enactment of the 1916 Shipping Act manifested a Congressional intent to treat the ocean shipping industry differently from other industries and businesses subject to the antitrust laws.

As an illustration, I would like to quote from a 1940 Duke University Law Review article by Mr. Walton Hamilton, then special Assistant to the Attorney General, Antitrust Division:

"In a number of instances where it is manifest that competition does not do the job. Congress has resorted to another type of regulatory device . . . Under the Shipping Act certain agreements are excepted from the Sherman Act; but it is unlawful to carry out such understandings without the approval of the Shipping Board . . . In all such cases the public interest is as clearly and fully recognized as under the antitrust laws. But . . . shipping, and things relating thereto, have ways of their own and places quite unique in the national economy. So a public authority is set up to better impose the public interest which a primitive competition seems powerless to promote."

It is clear that the application of antitrust concepts has not done the job: That our merchant fleet has been diminished rather than promoted by the enforcement of these laws. We are eager to work with the supporters of S. 1593 and S. 125 to demonstrate that the public interest will be best served by exempting ocean liner shipping activities from antitrust constraints and by relying on an updated Shipping Act as our regulatory framework.

The Maritime Institute also supports the elimination of the so-called "public interest" test from agreement approval standards. This wisely removes a vague antitrust principle from the scope of Federal Maritime Commission considerations. We also agree that the burden of proof in a Federal Maritime Commission proceeding should be borne by the opponent of an agreement.

An important corollary to the grant of antitrust immunity to conference activities is the clarification of Federal Maritime Commission jurisdiction over intermodal transportation arrangements. The ability of carriers in U.S. foreign commerce to establish through intermodal rates and to have such rates filed with and subject to a single agency will lead to the development of an efficient intermodal network.

As stated in the Commerce Committee's report on the Ocean Shipping Act of 1980 (S. Rpt. 96-656, p. 10) the lack of clear antitrust immunity for such arrangements "inhibits conferences in U.S. trades from agreeing among themselves on the charge to quote shippers who choose to use conference facilities for the inland leg of a foreign door-to-door movement and it clearly frustrates the growth of an innovative, efficient, and economical transportation service." The successful utilization of intermodalism results in greatly increased productivity and benefits everyone from the carrier to the shipper to the consumer. While the FMC has exercised its jurisdiction over such arrangements. The Justice Department has continually questioned the FMC's authority in this regard. We support the clarification of the law as contained in section 4(B) of S. 1593.

The need for expediting Federal Maritime Commission procedures is also necessary. To the extent that placing time limits on FMC action will reduce delay and contribute to a more efficient operational climate for United States-flag vessels, we support such time limits.

As noted earlier, many of the specific proposals contained in S. 1593, including those relating to closed conferences, loyalty agreements, independent neutral body policing and shippers councils have been discussed by our member companies. There are, however, two aspects of S. 125 which we believe warrant attention.

Section 102(5) of S. 125 defines "common carrier by water in foreign commerce." This definition accurately reflects and attempts to solve the problem of cargo diversion from U.S. ports. It includes within the definition carriers engaged in United States export and import trade whether or not its service operates through or originates or terminations at American ports. Such carriers would, under this definition, be required to file their tariffs with the Federal Maritime Commission. This would place American carriers on a more equal footing with those who transport from contiguous foreign ports.

Finally, Mr. Chairman, we wish to reaffirm our support for the promotional provisions contained in the Title IX of S. 125. We believe the section on intergovernmental maritime agreements provides a proper and much needed response to the worldwide proliferation of cargo sharing laws and policies. This proposal recognizes that the American merchant marine is forced to compete—or at least attempt to compete—in a world market where an increasing number of nations direct cargoes to their national flag lines and discriminate against American vessels.

During the recent Presidential campaign, then-Governor Ronald Reagan stated that America's maritime program must "recognize the challenges created by cargo policies of other nations . . .. We must be prepared to respond constructively for our own interests to the shipping policies of other nations." The provisions in S. 125 which direct the negotiation and implementation of intergovernmental maritime agreements whenever another nation's policies exclude or discriminate against American vessels is consistent with President Reagan's maritime program.

In conclusion, we would again like to commend you Mr. Chairman and your Subcommittee for the prompt attention to the serious problem of liner shipping regulatory reform. The Maritime Institute stands ready to work with you towards the enactment of this vitally important legislation.

Thank you.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. U.S. carriers, U.S. ports in the northeast, and on-shore maritime labor are suffering because shipments of cargo from the U.S. which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates which would be illegal in the U.S. from an ocean carrier who picks up or discharges such cargo at a Canadian port.

Should a carrier be required to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. Yes. As we indicated in our prepared statement, our member companies support section 102(5) of S. 125 which defines "common carrier by water in foreign commerce" as a common carrier by water between the United States or any of its territories or possessions and a foreign country, whether engaged in the import or export trade, and *whether or not its service operates through or originates or teminates at ports of the U.S. or its territories or possessions.*

This provision would rectify an inequity in existing law. Presently, carriers using U.S. ports to transport cargo on an intermodal basis between U.S. points and overseas ports are subject to the tariff filing and anti-rebating provisions of the Shipping Act of 1916. Carriers using ports in foreign nations contiguous to the U.S. to transport U.S. origin or destination cargo are not subject to these same provisions. Consequently U.S. ports and carriers serving the U.S. are seriously disadvantaged. A recent Maritime Administration study (U.S. Exports & Imports Transshipped via Canadian Ports; March 1981) indicates that in 1979 the dollar value of U.S. imports and exports transshipped through Canadian ports was almost $3.4 billion. This translates into significant numbers of lost vessel calls and employment opportunities.

It is important to emphasize that a provision such as section 102(5) of S. 125 will simply place all carriers competing for U.S. imports or exports on equal footing with regard to tariff regulation by the Federal Maritime Commission. A new class of common carriers will not be created nor will the movement of cargo be in any way inhibited or restricted.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. The elimination of tariff filing requirements could, in our opinion, adversely affect U.S.-flag carriers.

Current tariff requirements foster open and fair competition among carriers by ensuring that carriers actually charge shippers the rates advertised. Without such requirements rate wars might ensue, to the detriment of many U.S.-flag carriers. In addition, and especially important, if the existing tariff filing requirements were eliminated, the benefits derived from the anti-rebating and controlled carriers laws would be negated.

As the Federal Maritime Commission is quick to point out, the Shipping Act as it applies to foreign commerce, unlike domestic regulatory programs in other transportation modes, does not invest the Commission with classic regulatory rate authority, i.e., authority to set and adjust rates. Carriers are free, with existing tariff filing requirements, to establish rate levels in accordance to commercial practices without interference from the Commission.

Question. Should labor unions be entitled to file complaints under the Shipping Act?

Answer. Present law (section 22(a)) of the 1916 Shipping Act provides that any person may file a complaint with the Commission. Section 13 of S. 1593 would, however, limit the filing of complaints to ocean common carriers, shippers or other persons subject to the Act. We know of no justification for such a limitation. However, we believe that representatives of maritime labor would be better able to assess the possible impacts of precluding labor unions from filing complaints under the 1916 Act.

Question. Yesterday the National Industrial Traffic League suggested that as an alternative to Shippers' Councils, shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

What are your views?

Answer. S. 1593 and S. 125 both provide for more effective communication between carriers and shippers by authorizing shippers' councils and immunizing their activities from the antitrust laws.

With regard to these specific provisions, we take no position. This is an issue to be thoroughly reviewed and discussed by the shipper community. However, to be the extent that shippers' councils are included in legislation recommended by the Committee, the scope of their permitted and prohibited activities should be specifically delineated.

Question. Should any legislation the committee recommends include without substantive change the provisions of the Maritime Labor Agreement Act which was enacted last year?

Answer. Yes. Without specific incorporation of the provisions of P.L. 96-325 the possibility exists that maritime collective bargaining agreements may be arguably subject to the filing and approval requirements of the Federal Maritime Commission. In enacting the Maritime Labor Agreements Act of 1980, Congress determined that the maritime industry should not be singled out as the only industry in the U.S. to be deprived of the benefits of the express national policy of free and unfettered collective bargaining without government intervention. The law retains Commission jurisdiction over maritime labor agreements to the extent necessary to prevent abuses. Any legislation recommended by the Committee should specifically exempt maritime labor agreements from jurisdiction of the Commission.

Question. Do you believe the dollar level in S. 1593 for bonding of freight forwarders and non-vessel operating common carriers is too high; too low?

Answer. We have no position as to what the bonding level should be for freight forwarders and non-vessel operating common carriers. Perhaps the best solution would be to leave the bonding requirement within the discretion of the Commission.

Question. Should the requirement in present law requiring non-vessel operating common carriers to file tariffs be retained in any legislation the committee recommends?

Answer. Yes. S. 1593 does not require NVOCC's to file tariffs as under current law. S. 125 would continue the present filing requirement. We agree with the Federal Maritime Commission that there is essentially no distinction in the services provided by NVOCC's and vessel operating common carriers which would justify disparate tariff treatment. The rationale behind tariff filing for vessel operating common carriers is equally applicable to NVOCC's. Consequently, we support retention of the present tariff filing requirements.

Question. Should independent ocean freight forwarders be licensed by the FMC?

Answer. Yes. Federal Maritime Commission licensing of ocean freight forwarders ensures that forwarders have the financial qualifications, business expertise and reliability necessary to properly and completely perform the services which they offer. Discontinuing the licensing requirement may well lead to the abuses and malpractices that existed in the industry prior to the grant of licensing authority to the FMC. We therefore favor continuation of the present system.

Question. Should legislation mandate "self-policing" by neutral bodies for all independent carriers, even if the independent's share of cargo in a specific trade is relatively insignificant?

Answer. Under current section 15 of the Shipping Act the FMC has the authority to disapprove an agreement upon a finding of inadequate policing of the obligations under the agreement. Section 5(2)(3) of S. 1593 provides that conferences must engage the services of an independent neutral body to police the obligations of the conference and members. In contrast, S. 125 section 310 would extend the neutral body policing requirement not only to conference members but to independent carriers as well. We support the extension of independent neutral body policing to all carriers, conference and non-conference, serving major U.S. trades.

Section 310 of S. 125 would also authorize the Federal Maritime Commission to dispense with independent neutral body policing in any trade where it finds that the cost of such policing would be unreasonably large in comparison to the size of the trade. We would not oppose this provision.

Question. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. No. Present law allows any changes in rates which result in a decreased cost to the shipper to become effective upon the publication and filing with the Commission. S. 1593 continues this policy. S. 125 would, however, require changes resulting in a rate decrease to be filed on 15 days notice.

We recognize that similar requirements are imposed on controlled carriers and domestic offshore carriers. While we fail to see the need for such a notice requirement, we would not oppose it if other members of the industry deem it necessary.

Question. The committee has heard a good deal of testimony from carriers about the efficiencies of a closed conference system, and their effectiveness in combating overtonnaging, etc.

Would closed conferences be effective in this regard in our South American trades where there are government-to-government cargo sharing agreements, and bilaterals to implement them?

Answer. It is our understanding that existing bilateral agreements in our South American trades have proven effective. The agreements have, among other things, helped keep rates down and assured significant participation by United States vessels.

Consequently, we believe that in these trades, particularly with respect to Brazil and Argentina, the proper implementation of bilateral agreements is achieving many of the same beneficial results normally attributed to the use of closed conferences.

Question. One of the standards for approval of agreements in S. 125 is that they are consistent with an expressed regulatory policy that "assures carriage by vessels of United States registry of a substantial portion of waterborne export and import foreign commerce of the United States in order to further both the economic and national defense goals of the Nation."

(A) Do you believe it is appropriate to include such a standard in any legislation we recommend?

Answer. We believe the maritime regulatory policy of the United States should reflect the fact that the economic and national defense goals of our nation demand the carriage of a substantial portion of our foreign commerce on American ships. Many other nations, in their approach to maritime regulation and through other steps, favor the use of their national flag vessels.

Consequently, we believe the inclusion of such a standard is not only appropriate but essential to ensure that liner shipping regulation proceeds in a manner consistent with other national objectives. While we do not wish to suggest that the FMC assume the promotional responsibilities of the Maritime Administration, the clear reaffirmation of Congressional intent would serve to place other nations on notice that the United States recognizes the importance of a strong U.S.-flag merchant marine.

Question. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. The authority of the Commission to require the filing of special or periodic reports pertaining to the business activities of those subject to the Shipping Act should be continued. We concur with the Commission position that the ability to gather information on the industry it regulates is vital to its ability to function effectively. As the Commission indicated in its prepared submission to the committee, based upon information gathered via its section 21 authority it has on many occasions foregone a formal proceeding or investigation thereby saving time and money for all parties involved.

We also agree that section 21(b) authority to require certain certifications with regard to the anti-rebating policies of companies should not be eliminated or weakened. Its elimination may indeed be a signal to some carriers that Congress is backing away from its strong position against illegal rebating.

Question. Should non-vessel operating common carriers be authorized to enter into agreements for economic cooperation with other persons subject to the act, and thus receive antitrust immunity once the FMC has approved the agreement?

(A) Are non-vessel operating common carriers now permitted under under the law to file "intermodal rates" or provide "through transportation", as common carriers by water?

(B) Should any legislation we recommend permit them to do so?

Answer. We take no position with regard to authorizing non-vessel operating common carriers to enter into agreements for economic cooperation with other persons subject to the Act. We note, however, that both S. 2585 as passed by the Senate last year and H.R. 6899 as reported by the Merchant Marine and Fisheries Committee included NVOCC's as "common carriers by water" and "ocean common carriers," respectively, thereby enabling them to enter into such agreements. The hearing records do not indicate opposition to such an approach.

Question. Under present law, the FMC may approve a conference agreement for economic cooperation (including pooling) among its members even if the effect of that agreement is to prevent competition from "outsiders" in the trade. If the FMC approves such an agreement, the parties, of course, receive antitrust immunity.

Do you believe whatever legislation we recommend should give the FMC this authority, and continue the antitrust exemption?

Answer. Yes. As we stated in our prepared statement we believe that the most fundamental principle embodied in S. 1593 is the grant of complete antitrust immunity to authorized activities and the reestablishment of the Shipping Act as the body of law governing international ocean shipping activities in U.S. foreign commerce. To the extent that current law may permit agreements which may have the effect of limiting competition from "outsiders", we believe this authority should continue.

Question. Which of your member companies favor closed conferences; open conferences?

Answer. The subcommittee has received testimony from many of our member companies regarding closed and open conferences. As the record indicates, one of our companies, Sealand, expressed support for open conferences and five of our companies—Farrell Lines Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines Inc., Prudential Lines Inc., and United States Lines, Inc., testified that closed conferences are "a step in the right direction."

ATTACHMENT

MEMBER COMPANIES, MARITIME INSTITUTE FOR RESEARCH AND INDUSTRIAL DEVELOPMENT AS OF APRIL 1, 1981

Alaska Bulk Carriers Inc.
American Eagle Tanker Corp.
American Foreign Steamship Corp.
American President Lines, Ltd.
Amerada Hess Corp.
Amoco Shipping Co.
Anchorage Tankships Corp.
Baldbutte Shipping Co.
Blue and Gold Fleet.
California Rice Transport Co.
Central Gulf Lines.
Chas. Kutz & Co., Inc.
Chestnut Shipping Co.
Connecticut Transport Inc.
Delta Steamship Lines, Inc.
Empire Transport Inc.

Farrell Lines Inc.
First Shipmor Associates.
Foss Launch and Tug.
Fourth Shipmor Associates.
Fredericksburg Tankers Inc.
Gastrans Inc.
Grand Basa Tankers.
Hudson Waterways Corp.
Hudson Waterways Navy Agency Div.
Intercontinental Bulktank Corp.
James River Transport Inc.
Keystone Shipping Co.
Keystone Tankship Co.
Louisiana Sulphur Carriers, Inc.
Lykes Bros. Steamship Co., Inc.
Manhattan Tankers Co., Inc.
Margate Shipping Co.
Marine Alaska, Inc.
Marine San Diego Inc.
Marine Transport Lines Inc.
Marine Transport Lines USN.
Matson Navigation Co.
Mohawk Shipping Inc.
Monticello Tanker Co.
Montpelier Tanker Co.
Moore-McCormack Lines Inc.
Moore-McCormack Bulk Transport Inc.
Mount Vernon Tanker Co.
Mount Washington Tanker Co.
Natalie Tankships Corp.
Navieras de Puerto Rico.
Ocean Bulk Ships Inc.
Ocean Transportation Co.
Ogden Leader Transport Inc.
Ogden Merrimac Transport Inc.
Ogden Sea Transport Inc.
Ogden Traveler Transport Inc.
Overseas Bulktank Corp.
Overseas Oil Carriers Inc.
Panama Canal Commission.
Pelican Marine Carriers Inc.
Penn Tanker Co.
Prudential Lines Inc.
Puerto Rico Marine Oper. Co., Inc.
Rio Grande Transport Inc.
Sea-Land Service Inc.
Second Shipmor Associates.
Shipco 668 Inc.
Shipco 669 Inc.
Shipco 2295 Inc.
Shipco 2296 Inc.
St. Phillip Coastal Towing Co.
St. Phillip Offshore Towing Co.
TTT Inc.
Third Shipmor Associates.
Transbulk Carriers, Inc.
Transoceanic Cable Ship Co., Inc.
Transport Commercial Co.
Trinidad Corporation.
Trinidad Corporation Contract Navy.
Tug and Tow Corp.
Union Carbide Corp.
United States Lines, Inc.
Vivian Tankships Corp.
Wabash Transport Inc.
Waterman Steamship Corp.
West Coast Shipping Co.
Willamette Transportation Inc.

Senator GORTON. Thank you all very much.

The endorsements which you have given us are of real value, because your organizations are so broadly representative of the U.S.-flag maritime industry and the American merchant seamen.

On which major issues—and this question is for any or all of you—other than the need to clarify the antitrust immunity, would you say there is genuine consensus among your members; on conference membership, on the right of independent action? Let's take those two first.

Is there consensus among your members?

Mr. LEFF. I think one issue all our members clearly agree with would be placing jurisdiction for intermodal agreements with the FMC.

Mr. PATTI. I believe another would be the provision in the legislation regarding loyalty agreements. I don't believe there's total consensus with respect to conference membership

Mr. LEFF. That's correct.

Senator GORTON. How about the need to file tariffs with the FMC at all?

Mr. LUCIANO. My own view, Mr. Chairman, is that that's absolutely essential to the shipping legislation—not only in this bill, but in existing law.

It is my understanding that there are many pieces of legislation which guard against such practices as predatory rates of State controlled fleets, which would be undermined if there were no such provision.

The consensus seems to be, among the companies we've discussed this with, that they would like to see the Federal Maritime Commission substantially strengthened in its international role. I think the FMC would virtually disappear if there were no tariffs to review.

Senator GORTON. The other two agree with that?

Mr. PATTI. We would agree.

Mr. LEFF. As I said in my remarks this morning, I think one of the things that would flow from the lack of filing any tarriffs would be the rate cutting that would kill U.S.-flag participation in the foreign liner trade. So, we think it's necessary.

Senator GORTON. One other question: Would it not be inconsistent for us to use legislation intended to end the extraterritorial application of our antitrust laws to impose an extraterritorial tariff-filing requirement for intermodal traffic entering or leaving the United States through Canadian ports?

Mr. PATTI. I'd go first on that one.

Senator GORTON. I think you probably should.

Mr. PATTI. Yes; although we understand how it could be viewed as inconsistent, our position however is that it is not. As we read the legislation, its primary purpose or ultimate goal is to do whatever can be done in the regulatory arena to place American-flag operators on a much more equal footing with their foreign counterparts in all matters regarding the regulation of shipping.

The situation right now, with the so-called cargo diversion legislation, is what we perceive to be a loophole in the law. On the one hand, American operators are required to take certain steps. On the other hand, others are not.

We don't support the proposal that had been made over in the House Merchant Marine and Fisheries Committee to exempt everyone from filing of tariffs. We believe tariffs should be filed. And maybe an overly simple solution is if tariffs are going to be filed and if we're talking about American cargo, import or export cargo, then all should, again, play by the same rules and tariffs should be filed by all.

Mr. LUCIANO. Senator, I think I understand your philosophical dilemma there. But I think we should go back to the intent of the legislation, the purpose of the Commission.

If the purpose is to set certain guidelines and controls on the way that American cargoes are handled in the foreign trades, and that intent should be a guiding factor and not whether or not a particular movement of cargo can be relabeled as Canadian cargo because we slip it out the back door.

Again, we come back to this kind of linguistic exercise that we get trapped in all the time. As you are aware, this is not the first time we've run into it. We've run into it in cases, for instance, where a Government aid program is relabeled something else. And therefore, cargo preference legislation does not apply to it, because it comes under a new rubric and a new rhetoric. I think the situation is analogous here, if cargo is just being moved out of the back door simply in order to satisfy some other objective.

We have to look at what the intent of the law is and not what the particular itinerary of a piece of cargo is.

Mr. LEFF. I would concur with that statement.

Senator GORTON. Again, I should like to thank all three of you for your enlightening testimony, which will be of great help to us.

We will next hear from Mr. John Brady, Chairman of the North Atlantic Ports Association Traffic Board.

STATEMENT OF JOHN H. BRADY, CHAIRMAN, NORTH ATLANTIC PORTS ASSOCIATION TRAFFIC BOARD AND MANAGER, TRANSPORTATION MANAGEMENT DIVISION OF THE PORT OF NEW YORK AND NEW JERSEY, ACCOMPANIED BY RICHARD A. LIDINSKY, JR., SPECIAL COUNSEL

Mr. BRADY. Good morning, Mr. Chairman. I would like to submit the prepared statement the traffic board has for the record.

Senator GORTON. It will be included in full.

Mr. BRADY. Good morning. My name is John Brady. I am the manager of Transportation Management Division of the Port Authority of New York and New Jersey and also serve as chairman of the traffic board of the North Atlantic Ports Association.

I am accompanied here this morning by Richard Lidinsky, who is our special counsel on the traffic board and also is the director of tariffs and national port affairs for the Maryland Port Administration.

The traffic board of the North Atlantic Port Association, just to give a little background about our association, was formed in 1961 to closely monitor rates and practices of land and water carriers serving our ports. Members of the traffic board—members of the NAPA who serve on the traffic board include the Massachusetts Port Authority, the Port Authorities of New York and New Jersey, the Philadelphia Port Corp., the Delaware River Port Authority, and the Maryland Port Administration and the Virginia Port Authority.

It should be noted for the record that although the traffic board's statement represents the collective official views of our ports, individual ports' statements expressing special concerns may be submitted to the subcommittee for the record.

Our board is in general agreement with the goals of S. 1593, but we would like to make several observations, comments, and suggestions which we believe will strengthen the bill.

One, as ports, we would continue to be regulated by the FMC as "other persons" subject to the act as defined in section 3(13), since we obviously engage in the furnishing of dock wharfage, warehouse, and other terminal facilities for ocean carriers. Our concerns are not with this section, but rather with the inclusion of the phrase "other persons" in section 4, "Authorized Activities," since there are many activities present in this section which do not fit the ports' activities, and, therefore, we would suggest subdividing the section to ocean carriers and "other persons"—"other persons or lines."

With reference to agreements in this section, we would like to cover in our comments section 5, section 12(c), and section 19(b).

Ports and other parties such as stevedores and private terminal operators would be required to file agreements for approval of the FMC under section 5 (a) and (b). We firmly believe that an area worthy of deregulation and the lessening of paperwork, administrative delays, and improvement of port conditions would be to exempt "other persons" agreements from filing requirements. We believe the proper vehicle to achieve this goal is an amendment to S. 1593, drafted by the National Association of Stevedores.

For section 3(1). We would only recommend that if the subcommittee agrees to that amendment, that it be expanded to agreements for dockage, wharfage, and warehouse activities.

The traffic board's other concerns with section 5 centers around the requirement for the right of independent action now contained in section 5(c)(4). We feel this subsection is to narrow—we would urge the committee to strike from the bill section 5(c)(4) (a) and (b) and simply say that 5(c)(4) provide the right of independent action for any member under reasonable notice, 10 days notice.

The traffic board supports the concepts of shipper councils as outlined in sections 4(c) and 5(d), but we would like to have included a new subsection which would provide a list of ports to be used under the agreements. This small amendment would give the ports adequate notice of any new shipping patterns, including the agreements which could possibly be—merit complaint under section 6(b)(1).

At the heart of present port regulation by the FMC is section 17 of the Shipping Act of 1916, which in its second paragraph grants the Commission authority over "other persons" alluded to earlier and is the basis for FMC general order 15, which provides for marine tariff filings. Ports or marine terminal tariffs are the rate notices for the port terminal users and are generally very cost competitive in nature. All ports do file tariffs, and this is a very important activity which must be continued.

Our ports and most ports in other ranges are unanimous on this issue, since filing tariffs is not a burden and does give us the assurance that other ports have an open record at the FMC, subject to examination and possible complaint and review and which provides at the same time an aura of Federal officiality to our activities.

Unfortunately, S. 1593 does disturb this practice, and we believe it does so unknowingly. Section 19(a) would shift the present section 17 authority to domestic commerce only, and this would not only cause the removal of the present FMC terminal tariffs' foreign commerce jurisdiction, but more dangerously create chaos on the terminal tariffs of the Americans by in effect deregulating foreign cargo but continuing regulation of domestic—a split that would be impossible to live with.

Therefore, we, the traffic board, would urge the present language in the second paragraph of section 17 of the 1916 act be inserted as a new subsection in section 12(c) so that other persons continue to establish, observe, and enforce reasonable port-related activities.

Another minor amendment we would recommend is that the word "port" be inserted in section 13, "Filing of Complaints, Investigations, Reparations," so there is no doubt of our standing before the Commission.

Finally, we would like to offer general comments and observations on section 11, which deals with the freight forwarders and non-vessel-operating common carriers.

In our experience and opinion, it would be a mistake to remove the licensing requirements for forwarders. We state this viewpoint not only from a day-to-day, practical, operational necessity for shippers to deal with steady, known, reliable, forwarders but also in the knowledge that the FMC has done an excellent job in licensing and sometimes delicensing with these people.

We would also like to add that the $150,000 bonding requirement seems very high and request that the subcommittee pay special attention to the views of the National Customs Brokers & Forwarders Association in this entire area.

In conclusion, Mr. Chairman, we pledge to you that we will work closely with you and your staff to achieve the mutual goals of a strong international liner shipping policy for our country.

Thank you.

Mr. Lidinsky and I will be glad to answer any questions.

Senator GORTON. Thank you.

You suggest that there would be little value in requiring ports to file their agreements and seek Federal Maritime Commission approval. Are you also suggesting that these agreements should nevertheless be immune from the antitrust laws?

Mr. LIDINSKY. I think, Mr. Chairman, we would be willing to put it in the category of taking our risks in that area, not have a blanket grant of immunity.

Senator GORTON. In other words, your preference would be to not change their antitrust status, but not have them file?

Mr. LIDINSKY. That's correct.

Senator GORTON. Would you give your rationale for that?

Mr. LIDINSKY. Well, we feel that, if I can use my own port as an example—we submit very few agreements to the Commission, and the agreements that we do submit are between ourselves and, let's say, a stevedore for a particular terminal operation, which doesn't really have a great effect on the rest of the ports' competitive positions.

We do find ourselves and other ports having experienced similar delays at the Commission of many months—sometimes months turning into years in getting these agreements approved and getting these operations underway. So I think that the nature of what we would want to do under an agreement is certainly nothing to give anyone concern. At the same time, we're willing to have it exempted and take our chances under the law that presently stands.

Senator GORTON. Should we eliminate language in current law forbidding discrimination among ports?

Mr. LIDINSKY. No; absolutely not.

Senator GORTON. Doesn't the theory of open competition demand that each carrier or shipper be free to move cargo through whichever port or route provides the best service or the lowest cost?

Mr. LIDINSKY. I think that's a proper theory, and I think that takes place today. I think there is very healthy competition among ports. Ports are a very competitive group in this industry.

Ten years ago, ports in the North Atlantic range began to experience, and experience today, serious cargo diversions to the Far East because of a development which did help shippers—minibridge, microbridge, the various intermodal movements.

Ports in the North Atlantic and ports in other sections of the country are suffering today because of innovations which go north and take cargo to Europe through Canadian ports.

So I think the discrimination protections that are built into the act today still serve a very useful purpose and are needed so that ports making millions of dollars of private investment—not Federal money, but State money, municipal money—private money—are able to carry their case to the Commission and make an argument for discrimination.

Five years ago when the Commission in the minibridge case said that cargo can move anywhere, ports were concerned and ports felt, well, the principles that were established of natural tributary and all the rest were certainly out the window.

But then 2 or 3 years later, comes along the *Wilmington, N.C.* case [FMC Docket 77-50] in which the Commission said: "No, it's not proper for an ocean carrier to use any device to lure cargo away from a port."

So I think there's a definite need for continuation of the discrimination protection. We would oppose that.

Senator **GORTON**. What sorts of complaints might a port file under section 13, if you were granted that authority, and why is it important to you?

Mr. **LIDINSKY**. Well, I think the types of complaints that a port individually or as a group would file would be incorporation of certain ocean rate practices, certain conference activities, certain activities that might be undertaken by a shipper council and a conference if that came about.

Today, you know, ports in our range are involved in a couple of proceedings at the Commission along those very lines.

I would say that ports are not at the Commission a hyperactive group and that they are running there every other day with complaints. I think port complaints are few and far between, and when a port goes to the Commission, it is usually with a very sincere concern that something is happening. But we're certainly not litigation crazy.

But at the same time, we do monitor what carriers are doing, and we do so not only in our interest, but we do so in the interest of the shippers using our ports, because we find that shippers are often a very quiet group or a group that's very reluctant to step forth and get involved in regulatory proceedings.

So we perceive our activities not only as you might describe as sort of promoting and protecting—we're certainly promoting our ports' range and our own individual port; we're also trying to protect ourselves and protect shippers using that port.

Senator **GORTON**. Please explain to me why the right of independent action among conference members would concern a port?

Mr. **BRADY**. As members of the North Atlantic port group, we have one particular port that has a problem where the conference—there's one conference in the North Atlantic range that does not have this right of independent action, while the conference in the next group of range ports, the southern group, has this right of 48-hour independent action, and they're able to divert cargo from his port to the southern ports because of this fast independent action from the one side where the other conference would be restricted.

So it is dangerous, expecially in the small area where you might have a lot of cargo that would be diverted from one port to another in this tight North Atlantic/South Atlantic ranges.

Mr. LIDINSKY. You would have a situation, Mr. Chairman, where the port in question is Norfolk, where the range divides North Atlantic, South Atlantic below Norfolk, and a carrier might call Norfolk, who belongs to two separate conferences—the North Atlantic Conference and the South Atlantic Conference—and shippers using Norfolk, desiring to stay in Norfolk, might request this carrier to take a right of independent action and, in effect, stay in Norfolk, and the carrier will say, "No, I can't, because I belong to a conference that doesn't have such a right. But if you shift the cargo down to Charleston or Savannah, I call down there, too, and I'll take care of you down there.

So this has been a particular concern of Norfolk, sort of being caught on the line, so to speak.

Senator GORTON. I'd like you to explain a little bit more broadly your position on the cargo diversion issue. Aren't you inclined to believe that the international relations problems with Canada would be more trouble than they're worth if we attempt extraterritorially to impose tariff-filing requirements?

Mr. LIDINSKY. Well, our group has been active on the House side, and we support H.R. 3637. We supported Senator Inouye's language in S. 125, which also would deal with this problem.

We live with this problem day to day in the North Atlantic range. Our cargo statistics for the first 6 months are down very drastically. The cargo statistics of the Port of Montreal are up very sharply.

We have talked to shippers who know what's happening. We talked to a shipper in St. Louis who previously used New York, who said, "Well, now I go through Montreal because it's $700, $800, and $900 a container cheaper".

Now, what we have been able to reveal on the House side, Mr. Chairman, is that the Canadian Government, through the activities of CAST, which is the primary mover of this cargo away from our port—the Canadian Government speaks out of both sides of its mouth.

It sends a note up to the committee, saying that, in effect, such legislation is harmful to Canadian-American relations and the traditional international flow of cargo and all the rest.

Then, the same Government turns around and gives CAST $35, $45 million in purchasing their stock through the Government-owned Canadian National Railway.

So I think the previous witness has hit some of the proper themes. It's a question of fair play. It's irrelevant that this cargo leads through Montreal or through Mexico. It's U.S. international liner cargo. And if technology and speed and the fact that we have good relations with our neighbor enables it to leave from a foreign port, that's a fact of life. But I don't think we should wash our hands of at least some minimal regulation of this cargo, which is the rate filing.

Senator GORTON. Why would requiring tariffs on such cargo through Canadian ports facilitate better competition or do a favor to United States ports? Tariffs, per se, don't make a carrier more or less competitive, do they?

Mr. LIDINSKY. That's correct, but you're faced with a situation today where the example I gave of the St. Louis shipper, let's say, who might have 500 containers, very large chemical corporation might have 500 or 600 containers per month.

Now, CAST salesmen in this country, not publishing a tariff at the Commission, are able to, in effect, go shipper shopping. They can come into me—I'm a large shipper—and they will quote a very favorable rate. They can come into Mr. Brady, who is a small shipper, and give him a different rate for the same type of cargo, the same movement. And they might not call on you at all because you only ship three containers a month.

So, we said this on the House side, and this is the guts of the matter, that American ports, American railroads, American truckers, American carriers, both foreign flag and U.S., calling our ports, are unable to compete with people they don't know what they're charging.

And if you're able to respond to something that's really not published, you must have a crystal ball. And this is the essence of why these rates need to be filed. And the situation grows, whereas CAST has requested further motor carrier authority to extend into Southern States, all the Atlantic States. The whole Canadian situation is a time bomb.

The west coast dock union supports this bill because—and some western ports support it, too, because I think they rightfully perceive this as a time bomb ticking for the west coast. They saw what happened in the North Atlantic. It grows southward, and it's going to happen soon on the west coast unless we do something about it.

Senator GORTON. Thank you both very much for your help to us. We will have some more questions to submit to you in writing, as well as Senator Inouye.

[The statement follows:]

STATEMENT OF JOHN M. BRADY, CHAIRMAN, TRAFFIC BOARD, NORTH ATLANTIC PORTS ASSOCIATION, INC.

Good morning, Mr. Chairman. My name is John M. Brady and I am Director of Traffic for the Port Authority of New York/New Jersey and serve also as Chairman of the Traffic Board of the North Atlantic Ports Association (NAPA). I am accompanied this morning by our Special Counsel, Richard A. Lidinsky, Jr., who is Director of Tariffs and National Port Affairs for the Maryland Port Administration.

We sincerely appreciate the opportunity to testify on this important bill and congratulate you and your co-sponsors for undertaking this task.

The Traffic Board of the NAPA was formed in 1961 to closely monitor rates and practices of land and water carriers serving our port range. Member ports of the NAPA who serve on the Traffic Board include the Massachusetts Port Authority, the Port Authority of New York/New Jersey, the Philadelphia Port Corporation, the Delaware River Port Authority, the Maryland Port Administration, and the Virginia Port Authority.

It should be noted for the record that although the Traffic Board statement represents the collective official views of our ports, individual port statements expressing special concerns may be submitted to the subcommitte for the record.

The Traffic Board played a very active role in the 96th Congress regarding both major maritime reform bills—H.R. 6899 and S. 2585, the latter passing the Senate unanimously last year. Our ports are acutely aware of the necessity for reform of the Shipping Acts, for we are truly in an age of transportation revolution and many of the statutory intentions in the Acts have been surpassed by time and technology.

It has been the general position of our Board in dealing with regulatory change, be it at the Interstate Commerce commission or the Federal Maritime Commission, that we do not resist change, but want to make certain that in the course of altering the status quo that our ports and ports throughout the country for that matter, retain their rightful role in the maritime industry and retain the protections and abilities to exercise legal options which they possess today.

Our Board is in general agreement with the goals of S. 1953, but we would like to make several observations, comments, criticisms and suggestions which we believe will strengthen the bill.

1. As ports, we would continue to be regulated by the FMC as "other persons subject to this Act," as defined in Section 3(13), since we obviously engage in furnishing dock, wharfage, warehouse and other terminal facilities for ocean carriers. Our concerns are not with this Section, but rather the inclusion of the phrase "other persons" in Section 4, authorized activities, since there are many activities present in that Section (allotment of ports, regulate cargo volume) which do not fit port activities and therefore we would suggest sub-dividing the Section along ocean carrier/other person lines.

The reference to agreements in this Section would be covered by our comments on Section 5, Section 12(c) and Section 19(b).

2. Ports and other port parties such as stevedores and private terminal operators would be required to file agreements for approval of the FMC under Section 5(a) and (b). We firmly believe that an area worthy of deregulation and the lessening of paperwork, administrative delay, and improvement of port conditions would be the exemption of "other persons" agreements from filing requirements. We believe that the proper vehicle to achieve this goal is the amendment to S. 1593 drafted by the National Association of Stevedores for Section 3(1). We would only recommend that if the subcommittee agrees to their amendment that it be expanded to agreements for wharfage, dock, or warehouse activities.

A second concern the Board has regarding Section 5 is that ocean carriers through Section 4 would be able to incorporate into agreements port allotment authority. While we fully realize that port allotment is currently part of Section 15 of the 1916 Act, we wanted to note our concern that port allotment within a range can take on discriminatory tones and that we are pleased to note the presence of Section 6(b)(1) in the bill which would afford port protection from such discrimination.

The Traffic Board's final concern with Section 5 centers around the requirement for a "right of independent action" now contained in Section 5(c)(4). To come right to the point, we feel that the subsection is too narrow as written and will allow conferences in our range to stifle carriers who might want to act independently in a given situation, but who will not be allowed to do so by conference rules. One of our member ports has witnessed the situation whereby individual carriers belonging to both a North and South Atlantic conference will exercise a right of independent action in the South Atlantic to divert cargo from their port, but rely on conference rules handcuffing them in the North Atlantic to offer similar independent action rate inducements and thus invite more diversions from our range. To end this practice, we would urge the subcommittee to strike from the bill subsections 5(c)(4)(A) and (B) and simply state: 5(c)(4) provide the right of independent action for any member upon reasonable notice of at least ten days.

Such an amendment would be in the general interests of the ports, the shippers, and carrier competition.

3. The board supports the concept of shippers' council as outlined in Sections 4(c) and 5(d), but we would urge that 5(d) be amended to include a new subsection which states: (5) provide a list of ports to be used under the agreement.

This small amendment would give ports adequate notice of any new shipping pattern included in the agreements which could possibly merit complaint under Section 6(b)(1).

4. At the heart of present port regulation by the FMC is Section 17 of the Shipping Act, 1916, which in its second paragraph grants the Commission authority over "other persons" alluded to earlier and is the basis for FMC General Order 15 (46 CFR 533), which provides for marine terminal tariff filings. Port or marine terminal tariffs are the rate notices for port/terminal users and are generally very cost-competitive in nature.

In the area of agreements I discussed earlier, it should be noted that many ports do not even file agreements with the FMC and those that do often find the task very frustrating. However, all ports do file tariffs, and this important activity must be continued. Our ports and most ports in other ranges are unanimous on this issue since tariff filing is not a burden on us and gives us the assurance that other ports have an open record at the FMC, subject to examination and possible complaint and review, and which provides at the same time an aura of federal officiality to our activities. Indeed, the FMC case volumes are full of issues regarding port/terminal tariffs vs. ocean carrier activities, duties, etc. It is an area of our industry well understood and should not be disturbed.

Unfortunately S. 1593 does disturb this practice and we believe it does so unknowingly. Section 19(a) would shift the present Section 17 authority to domestic commerce only, and this would not only cause removal of present FMC terminal tariff foreign commerce jurisdiction, but more dangerously, create chaos on the marine terminals of America by in effect deregulating foreign cargoes but continuing regulation of domestic ones—a split which would be physically impossible to live with.

Therefore, the Traffic Board would urge that the present language contained in the second paragraph of Section 17 of the 1916 Act be inserted as a new subsection in Section 12(c), so that "other persons" continue to establish, observe and enforce reasonable port-related activities.

5. As a minor amendment—we would recommend that the word "port" be inserted in Section 13, filing of complaints, investigations and reparations, so that there is no doubt to our standing before the Commission.

6. Finally, we would like to offer general comment and observation on Section 11, which deals with freight forwarders and non-vessel-operating common carriers. In our experience and opinion it would be a mistake to remove licensing requirements for forwarders. We state this viewpoint not only from practical day-to-day operational necessity for shippers to deal with steady, known, reliable forwarders, but also in the knowledge that the FMC has done an excellent licensing and at times delicensing job with these people. We might also add that the $150,000 bonding requirement seems very high and request that the subcommittee pay especial attention to the views of the National Customs Brokers & Forwarders Association in this entire area.

In conclusion, Mr. Chairman, we want to congratulate you and Senator Inouye for your leadership in this area. We find many sections of Senator Inouye's new bill, S. 125, very desirable for ports, particularly Section 102(5)'s definition of "common carrier by water in foreign commerce," which would address and cure the inequitable situation where certain foreign interests are penetrating the U.S. waterborne liner market and escaping the full scope of existing U.S. law and regulation. H.R. 3637 presently in the House of Representatives focuses on this serious problem. We pledge to you our efforts to work closely with your staff in achieving our mutual goal of a strong international liner shipping policy for our country.

Thank you, and Mr. Lidinsky and I will be glad to answer any questions.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. Such scenario could take place, but with strong rate competition and reaction, shippers and carriers will know of the lower rate and respond.

Question. Should any legislation the committee recommends include without substantive change the provisions of the maritime labor agreement act which was enacted last year?

Answer. Yes. We support the MLAA as passed.

Question. Should the requirement in present law requiring non-vessel operating common carriers to file tariffs be retained in any legislation the committee recommends?

Answer. Yes. The Traffic Board believes NVOCC's should continue to operate under their present form of FMC regulation.

Question. Should labor unions be entitled to file complaints under the Shipping Act?

Answer. Yes.

Question. S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (1) "unjustly discriminatory", or (II) "detrimental to the commerce of the United States."

(A) Do you believe these two standards are sufficiently clear and precise so that parties will readily know their rights under the law; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. These standards are clear. What is needed is a resolve by the FMC to exercise expeditious decision-making and create precedents under these standards.

Question. The committee has heard a good deal of testimony from carriers about the efficiencies of a closed conference system, and their effectiveness in combating overtonnaging, etc.

Would closed conferences be effective in this regard in our South American trades where there are government-to-government cargo sharing agreements, and bi-laterals to implement them?

Answer. The closed conferences would have to adjust their composition and rate structure to accommodate government-to-government and bilateral cargo.

Question. Do you believe the dollar level in S. 1593 for bonding of freight forwarders and non-vessel operating common carriers is too high; too low?

Answer. Too high. FMC licensing plus a smaller amount of bonding is adequate.

Question. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts *to prevent illegal rebating.*

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

Answer. (A) Yes.

(B) Yes.

Question. If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?

Answer. Yes, there would be the adverse effect of no knowledge of competition's scope and shippers would have no means to "shop around" and verify rates for the expensive liner services.

Question. Should independent ocean freight forwarders be licensed by the FMC?

Answer. Yes, the FMC has done an excellent job in this area and the forwarding industry is one of the strongest and reliable segments of the maritime transportation process.

Question. U.S. Carriers, U.S. Ports in the Northeast, and on shore maritime labor are suffering because shipments of cargo from the U.S. which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadia ports. Under present law. The water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates which would be illegal in the U.S. from an ocean carrier who picks up or discharges such cargo at a Canadian port.

Should a carrier be required to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. Yes. It does not matter what port U.S. liner cargo moves through, be it Canada, Mexico, Puerto Rico or Bermuda, it is still the waterborne commerce of the United States. The argument of "extra-territorial application" of U.S. law is the same shield foreign interests always hide behind when they want to take advantage of our internal situtation. Fair play and equal application of law requires all of those moving our waterways commerce to file tariffs. There is no burden on these parties to file such tariffs. Recent statistics showing serious cargo declines for many U.S. ports point out very vividly the threat on Canadian cargo diversion. The Traffic Board fully supports language in S. 125 which would cure this problem In the final analysis, Canadian-American friendship will mean very little when the ports of Vancouver, Montreal and Halifax are prospering and the ports of Seattle, Chicago and New York are without U.S. cargoes to handle.

Question. Yesterday the National Industrial Traffic League suggested that as an alternative to Shippers' Councils, shippers be allowed to consult, either collectively or individually, with carriers without having to be members of a formal association designed solely for this purpose.

What are your views?

Answer. We support the shippers' council approach since without a formal structure only large shippers would dominate the carriers' interest on rate offerings. If a wide scope of shippers joined together on a geographic/commodity/container vs. breakbulk on whatever basis, the rate consultation would be more competitive and productive for all parties concerned.

Senator GORTON. Mr. Thomas W. Gleason, President of the ILA.

STATEMENT OF PATRICK J. SULLIVAN, LEGISLATIVE DIRECTOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ON BEHALF OF THOMAS W. GLEASON, PRESIDENT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

Mr. SULLIVAN. Mr. Chairman, obviously I'm not Thomas W. Gleason. My name is Patrick J. Sullivan. I am the legislative director of the International Longshoremen's Association, AFL–CIO. I have been a member of the ILA for 38 years. I've been an officer, an elected officer for the past 30 years.

I wish to apologize for Mr. Gleason for his absence this morning. But he advised me late yesterday afternoon that he would be unable to be here today and asked me to represent him.

Senator GORTON. His statement will nevertheless be printed in full in the record.

Mr. SULLIVAN. The reason Mr. Gleason is not here this morning is because he is meeting in New York with some of the major carriers and stevedore operators in our country concerning seeking a solution to some of the very problems that are addressed in his testimony that has been submitted to you and are matters under consideration in this legislation.

At the outset, Mr. Chairman, I would like to congratulate you and Senator Inouye on the thoughtful and obviously well-thought-out approach to this very serious problem that is addressed in S. 1593 and in Senator Inouye's bill, S. 125.

If I could summarize some of the points raised in Mr. Gleason's testimony rather briefly:

We support your legislation. We think it's a good piece of legislation. We think that there is an area for improvement and some of these improvements are addressed in Senator Inouye's bill.

We agree that the following points in the bill, the elimination of rebates for non-vessel-operating common carriers will be accomplished through the lifting of the antitrust restrictions.

We think the point that one way to eliminate the rebate problem is to eliminate the causes of the rebate problem.

Under section 10, the new definition of "controlled carriers," this definition takes into account the state-owned trading vessels of the Soviet Union and its Communist partners.

The point that we make that the Soviet Union deliberately uses state-subsidized rates not subject to U.S. regulatory review or approval to steal cargoes away from the United States and other free world countries are addressed in this bill.

One area where we feel that the act could use some improvement is in the definition of ocean carriers. Under section 3, subheading 12, it does not adequately address the problem of cargo diversion by intermodal container services. We offer some suggestions in the written statement, and later on, at the conclusion of the testimony, recommending that Senator Inouye's language addressing this problem be adopted.

We feel very strongly that exemptions should be granted from the antitrust laws to permit American carriers to participate in conferences and to place them on an equal footing with most of the other maritime nations of the world.

And on the issue of the FMC involvement, assuming jurisdiction in maritime labor contracts, we think that the matter that we thought had been laid to rest previously should be further addressed in this legislation.

Senator GORTON. If we can interrupt you on that point, we're very sympathetic with that. And that was an inadvertence. We don't intend to reverse last year's decision, and it will be back in the bill.

Mr. SULLIVAN. Thank you.

Basically, those are the highlights of the testimony. But I would recommend to you and to the committee that they carefully read our reasonings behind the recommendations we have made to you.

I am available to answer any questions that you may have, Mr. Chairman.

Senator GORTON. Why do you believe that requiring tariff filing is the solution to the problem of cargo diversion through Canadian ports? How is simply filing tariffs going to make intermodal service through U.S. ports more competitive?

Mr. SULLIVAN. Because it would place American ports and American carriers on an equal basis, with the competitors out of Canada, principally CAST. I think the point was made by the previous speaker that, in effect, CAST may be a controlled carrier that the Canadian Government may own a share of the company. There's testimony to that effect—CAST is able to come into this country and skim the gravy cargo off our markets.

It's very difficult, I would expect, for an American carrier to come in and quote rates which must be published and filed when the competition is not required to do so. They can walk in, look at the rates, look at the cargo, and put a sealed bid in. That's not available to the American carrier.

Senator GORTON. Will granting conferences the authority to establish intermodal through rates enhance the competitive stance of service through U.S. ports? I assume you think it will.

Mr. SULLIVAN. I think it will. But again, this is more, I think, a question of equity, allowing the American carriers to participate in the real world. The conferences set rates that we do not participate—are prohibited from participating in. And it places the American lines at a competitive disadvantage.

Senator GORTON. In enhancing the competitiveness of American ports, are any changes in labor practices being considered by your union and by those with whom they deal?

Mr. SULLIVAN. This is an ongoing matter.

I would like to note for the subcommittee, if American industry had adopted the changes in technology and the increases in productivity that the American maritime industry, particularly in the longshore field, have since the advent of containerization, maybe 20 years ago, we would be in really great, great shape today. There wouldn't be any inflation. I think the dollar would be worth a couple of dollars, because productivity in this industry has increased by over 2,000 percent in the past 20 years.

Where formerly a 10,000-ton vessel requiring five gangs, 120 men, would require 40 hours to discharge, today a vessel with 40,000 tons, with a much reduced number of men, can turn around in 8 hours. And this certainly is one of the positive contributions that the industry has made to the economy of the United States that is probably not recognized to the extent that it should be by our country.

Senator GORTON. Thank you very, very much, Mr. Sullivan. We're happy to have had you with us.

We may have more questions.

Mr. SULLIVAN. Thank you.

If there are any questions, please be assured that we'd be happy to respond to them, and we appreciate the opportunity to be here.

[The statement follows:]

STATEMENT OF THOMAS W. GLEASON, PRESIDENT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Mr. Chairman and Members of the Committee, my name is Thomas W. Gleason. I am the International President of the International Longshoremen's Association, AFL-CIO, known as the "ILA."

The ILA represents in excess of 100,000 members working in ports from Maine to Texas on the North Atlantic, South Atlantic, and Gulf Coasts of the United States as well as on the Great Lakes and in Canadian ports. More than 80,000 of our members are employed on waterfront docks, piers and terminals by stevedores and vessel carriers in a multitude of related crafts and occupations. As their collective bargaining representative, the ILA negotiates labor contracts with various multi-employer bargaining associations including the New York Shipping Association, Inc., the Council of North Atlantic Shipping Associations, West Gulf Maritime Association, Mobile Steamship Association, Inc. and Southeast Florida Employers Association.

The Bill before you, S. 1593, states at Section 2 (Declaration of Policy), that among its objectives is "to foster a liable and responsible service by ocean common carriers and conferences" and "to facilitate efficient and timely regulation by a single Federal agency of the various aspects of international line or shipping, responsive to the growth of ocean commerce and international developments affecting that commerce." These really are among the "means" to attaining the primary objective, which as first stated is "to develop and maintain an efficient ocean transportation system through commercial means, with a minimum of government involvement, in order to serve the needs of the United States foreign commerce;".

I believe you all can agree with me that an Omnibus-type bill such as this one cannot truly succeed unless it touches all bases, including the labor aspect, directly and conclusively. Neither the means nor the ends of this proposed Bill can be fully realized unless it is compatible with labor peace and stability not only at sea but ashore as well, which is needed to foster that reliable and responsible service. Though the ILA does support the thrust of this legislation which is a fine and overdue attempt to bring our maritime industry into line with the competitive realities of the 1980's, we are also convinced that it is deficient in two major areas affecting maritime labor. It is apparent to us that both of these deficiencies have been earlier addressed by the Senate and can be corrected before the Bill goes forward.

Before I get to these I would like to address the very positive and enlightening features of this Bill.

As you no doubt are aware, the advent of containerization some 20 years ago had a drastic effect on the job opportunities for longshore workers. It has therefore been a very difficult problem in negotiations and, because of the interference of certain government agencies, promises to continue to be one.

A prime factor in the loss of job has been the granting by ocean carriers not only preferred tariff rates but also what amount to rebates to so-called non-vessel operating common carriers ("NVOCC's") and freight forwarders who were permitted to put the goods of their customers into containers at their off-pier locations. This practice began in the continental United State and Puerto Rican trade. It later expanded into the North Atlantic ocean trade, to the extent that millions of man-hours of work were lost to our members who work on-pier exclusively in the handling of cargo. Section 12 of this Bill designates among the acts prohibited by ocean common carriers rebating, kickbacks and other underhanded devices which have contributed to this situation. We trust that once passed this section will be given the support necessary to enforce it.

It has been also stated that the only realistic way to eliminate rebates is to eliminate the need for them. This is only possible when the parties involved are able to work together collectively for their common good. The inability of carriers, because of antitrust fears, to work together and rationalize services and equipment perpetuates over-tonnaging which in turn perpetuates pressures to rebate. Equally important is the inability to deal with groups of shippers to negotiate satisfactory freight rates, again because shippers councils are considered illegal in the United States. Fortunately, this Bill attends to the causes as well as the evils that present practices produce.

Another important remedial provision contained in the Act is that pertaining to "controlled carriers" at Section 10. A controlled carrier is defined (in Section 3, subheading "7") as "any ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by the government under whose registry the vessels of such carrier operate." This definition once and for all takes into account the state-owned trading vessels of the Soviet Union and its Communist partners. We in the ILA are keenly attuned to the effects that these eastern block vessels have had upon our maritime industry.

In 1972, the United States and Russia signed a maritime agreement which opened 40 U.S. ports to Soviet vessels. This, in effect, "opened the door" for the Soviets to establish cross-trade liner services. As a result, the Soviets have been concentrating on the high-value liner cargoes where their predatory rate-slashing tactics are destroying established free-world liner operators.

Indeed, until our union's members' refusal to handle Russian ships and cargo because of the USSR's invasion of Afghanistan, the Russians had made deep inroads into our foreign maritime activities. They deliberately used state-subsidized rates, not subject to any U.S. regulatory review or approval, to steal cargoes away from U.S. and other free world ocean carriers right before our very own eyes. Though it has been reported in the Journal of Commerce for July 23, 1982 that the Soviet carriers are considering joint ventures with U.S. lines, the Russians still emphasized that such a possibility of cooperation would have to preceded by a thawing in the political atmosphere between our countries. Everyone knows that such a prospect is questionable at the least, would take considerable time and negotiations and, in any event, would be constantly subject to reassessment with every American or Soviet move.

Accordingly, Section 10 validly and responsibly subjects such carriers to the requirement for filing rates and tariffs with the Federal Maritime Commission that must be "just and reasonable." It correctly and realistically places the burden of proof on the carrier to demonstrate that its rate is just and reasonable and if not, outlaws it. When this commendable provision is placed alongside the other areas of the Act, such as Sections 4(a), 5(b), 6(b), 8 and 12, which together at least give domestic ocean carriers and those of our allies trading through our ports a fair, fighting chance to compete with their free-wheeling counterparts from countries within the Soviet block and those who follow their practices, it gives some assurance that these carriers will be able to survive.

We must keep in mind that commercial vessels are part of the Western World's Merchant Marine. They are the backbone of maritime transportation in cases of national emergency or war. This Congress cannot stand by much longer and watch this highly important sector of our national economy and defense continue to backslide while the Soviets and their allies produce all kinds of non-military-type vessels at unprecedented rates in order to drive us from the seas. We are therefore gratified that the proponents of this legislation have grasped these facts of life and are doing something about it.

In so doing, the sponsors have recognized that modern free world fleets cannot efficiently or profitably under the restrictions imposed by the Antitrust Division of the Justice Department or by other regulatory interference. Vessels that are unable to take advantage of the concept of rationalization, which have to ply our seas with their bottoms half-filled—or half-empty—because of unreasonable and outmoded restrictions in an energy-conscious era, can no longer survive. In this sense, then, the Act does serve the needs of our foreign commerce by providing efficiency through a "minimum" of government involvement.

As laudable as these features of the Act are, they unfortunately do not go far enough to accomplish the Act's overall objectives. The "harmonizing" of U.S. shipping practices with those of our major trading partners and permitting "cooperation" among carriers and rationalization of services are hollow objectives, unless they can be implemented. By this I mean that unless this Bill concurrently addresses those activities in the industry that take place in whole as well as in part within the United States and reduces the pressures on those who service the industry by reliably and efficiently handling ocean cargo, then this Bill, however well-intended, will be rendered meaningless.

Thus, the present Bill defines an "ocean common carrier" at Section 3, subheading "12" simply as a "vessel-operating common carrier . . . engaged in the transportation by water of passengers or cargo between the United States and a foreign country, whether in the import of export trade;". To us in the longshore industry, this definition is more notable for what it does not include than for what it does. It fails to take into account a present—and growing—danger to the lifeblood of our industry.

Foreign-based ocean carriers have been providing so-called intermodal container service to shippers here in the United States who traditionally and historically had moved their cargoes through domestic ports serviced by our members, employed by the Associations' members who are parties to our contracts. They are succeeding in diverting this essentially U.S. cargo to ports of embarkation in Canada—and presumably could do the same through Mexico. Because of an oversight—or a failure of foresight—the Shipping Act of 1916 did not require these carriers—who take full advantage of our transportation and other systems developed with our taxpayer's money and which were created for the advancement of U.S. commerce—to file their rates with the Federal Maritime Commission. As a result, the U.S. carriers, whether or not they be members of conferences, do not have a fighting chance to compete and more and more of this commerce is being lost at home.

The North Atlantic Ports Association estimates that U.S. ports will lose three and a half million tons of cargo this year and 4,000-5,000 waterfront and related jobs on the East-coast alone because of these practices. In the process, there are thousands of lost truck and rail movements to our ports, vessel calls and activities that worked ordinarily contribute to our Local economies. For every driver that now hauls containers to a truck terminal or to a railway siding heading over the border, a score of longshore and related jobs are being lost in this country. Though we have many laws requiring foreign entities to register in order to do business and which require them to file periodic reports, this does not apply to these essentially maritime movements.

All we are asking is that American carriers be treated on an equal footing with foreign based carriers. By requiring the latter to file their tariffs, the shippers would know what competitive options are available to them. By no means would this prevent or restrict foreign based firms from competing and succeeding through these methods of operation. This is admitted by a key official of one such major foreign based carrier, who stated that such legislation cannot stop shippers from seeking the most economic routing for their freight. It only means that the carriers as well as the shippers will have access to the same kind and types of information regarding their tariffs and pricing that our foreign competitors already have through their ability to review tariffs filed by carriers working our ports.

If our ports and our members are going to lose jobs to other ports in other countries, then at least it should not be because they are operating in the dark but rather because they cannot compete. Some arms of the Administration appear obsessed with the supposed impact of this minimal application of federal relations. Let me assure you that there is no intent or effect of exporting U.S. regulatory law. It only looks to protecting this country's interest in the health of our economy. I note that these are the same executive agencies that have handcuffed our ocean shippers in competing with the Soviet block maritime fleets, which I have indicated this Bill already tackles.

I respectfully suggest that the definition of an ocean common carrier be expanded in accordance with the definition of a "common carrier by water and foreign commerce" as defined in S. 125 introduced by Senator Inouye. That Bill tracks a similar measure passed by the Senate during the 96th Congress. It expands the definition of common carrier as contained in the present Bill by providing that a firm will be considered to be a common carrier by water in foreign commerce "whether or not its service operates through or originates or terminates at ports of the United States or its territories, or possessions;". If the present Bill were to be amended by adding this language, then it would be truly encompass situations touching upon foreign maritime commerce both wholly and in relevant part as an authentic Omnibus Bill should do.

The second deficiency concerns the exemptions from the antitrust laws, which is addressed at Section 8 of the Bill. The omission inadvertently perpetuates a situation in the labor end of this industry that both the ILA and the employers believed had been corrected.

Approximately a year and a half ago I appeared before the Congress on H.R. 6613 which was an amendment to the Shipping Act of 1916. That piece of legislation, which was eventually enacted and signed into law, followed a Supreme Court decision in *FMC* v. *Pacific Maritime Association*, 435 U.S. 40 (1978), known as the "PMA" case. PMA in effect permitted the Federal Maritime Commission ("FMC") to exercise its pre-implementation review of lengthy and complex maritime labor agreements in every port in the United States. The 96th Congress recognized that this would inflict a serious setback in collective bargainin in the maritime industry. Parties could never bargain decisively because they would never know what the FMC will or will not approve. This would create chaos and uncertainty in labor negotiations in a key national industry. The NLRB, the Department of Labor and even the Department of Justice sided with the ILA's and the carriers' positions that the FMC should withhold its jurisdiction. Congress and evidently the President who signed the Act, concurred.

We in the industry were left with the firm impression that the new law would prohibit regulation of collective bargaining agreements by the FMC, period! Unfortunately, the FMC itself did not share our impression and there are others who are also misinterpreting the meaning and intent of the earlier legislation.

For the past seven years our union along with industry employers has been engaged toe-to-toe in a series of litigation with the National Labor Relations Board ("NLRB") and the FMC over the validity of certain provisions in our collective bargaining agreements, known as the "Rules on Containers." Our union insisted on some reasonable protection for traditional work opportunities of our dockside members which, as a I said earlier, had been drastically cut by automation. The Rules codified the parties' collective bargaining compromise in 1968 which permitted more than 80% of containerized cargo in the eastern Gulf Coast tobe transported without pier-side handling by ILA longshore labor. This issue has led to long and costly strikes in the industry the most recent of which occurred in October and November of 1977. In June 1980, the Supreme Court, in *NLRB* v. *ILA and NYSA* (447 U.S. 490; "NLRB") determined that the NLRB had committed an error of law in analyzing the validity of the Rules. The matter however, was not ended there. The Supreme Court remanded the matter to the Board for further fact-finding on matters which admittedly are in the province of the Labor Board.

However, the Court left open for further consideration the question of whether or not the FMC's separate finding, that the same Rules on Containers contained in our collective bargaining agreements violated the Shipping Act of 1916, could strike down the Rules notwithstanding that the Labor Board and the courts might find that they do not run afoul of the National Labor Relations Act, as amended, 29 U.S.C. et. seq. The Court stated that this issue "present[s] difficult and complex problems which are not properly before us." (NLRB at 512). Accordingly, the prospect still remains that maritime collective bargaining agreements may be arguably subject to the jurisdiction of the FMC, even though such an argument would run contrary to the thrust of a Bill on the subject enacted just one year ago.

The reasons accepted by Congress to bar pre-implementation of maritime labor agreements, such as those between the ILA and the employers, are equally applicable to post-implementation review, such as occurred in the instance of the Rules on Containers.

Maritime unions like the ILA are not subject to the FMC's jurisdiction. Notwithstanding that the Commission's determinations bind only the employers who are signatories to the agreements, it is manifest that the FMC can still prevent them from carrying out their part of their own bargaining commitments. Thus, the ILA employers attempted to lawfully exercise their right-of-control over containers that they own, lease or use, by refusing to release them to off-pier NVOCC's and over-the-road truckers who abused their use by avoiding the ILA longshoremen at the docks who should have handled the cargo inside those containers. The FMC has effectively precluded the vessel carriers and their agents from including any references to the Rules or their enforcement in tariffs filed with the Commission. Assuming that it will be ultimately determined that the Rules are valid collective bargaining provisions that can be maintained and enforced for the purpose of preserving the historical pier-side work of longshoremen, the fact that they cannot pass muster with the FMC will yet render them meaningless and useless, because the employers are not permitted to follow through in implementing them and policing them as their labor agreements oblige them to do.

This is a prime and "live" example of why parties in a bargaining relationship can never negotiate decisively under the present situation because they never will know what the FMC will not permit. Though the Commission can only regulate the employers, the unions themselves will still be placed in a position of uncertainty as to what the Commission's own ultimate interpretation might be with respect to a particular agreement or key provision in any agreement that they might conclude.

As noted above, the Supreme Court had recognized the complexity of dual-agency jurisdiction over collective bargaining agreements. The members of this Committee doubtlessly also recognize that behind every complex collective bargaining agreement is an even more complex grouping of factors which had their influence in shaping the ultimate agreements. An intelligent appraisal of any labor agreement cannot therefore be accomplished unless these factors are appreciated and, at most, the Commission is ill equipped for this Herculean assignment.

The NLRB, joined by the Department of Labor and even by the Department of Justice have recognized the ill-logic and unreasonableness of FMC jurisdiction over collective bargaining agreements in the maritime industry. In *New York Shipping Association* v. *FMC*, 495 F.2d 1215 (2d Cir. 1974), the Labor Board stated that:

"The process of collective bargaining is an ongoing series of negotiations, with one party making a concession on one subject in return for obtaining a concession on another. It is extremely difficult for the parties to make a meaningful judgment as to the kind of bargain they are negotiating if one or more of the key provisions on which agreement turns is subject to invalidation by the Commission. This kind of administrative supervision will impede the process of collective bargaining and could inhibit negotiators' attempts to arrive at novel solutions to troublesome labor problems. *The superimposition of the approval of the FMC over a matter that was so crucial to the agreement is likely to disrupt the process of collective bargaining and deter the speedy resolution of industrial disputes in the maritime industry.*" (Italics added.)

Similarly, in *Boston Shipping Association* v. *The United States*, S.R.R. 20, 828 (1st Cir. 1972), the Department of Justice stated in its brief that:

"However, where the agreements involved are made a part of the collective bargaining process—whether the actual contract or management agreements antecedent to it—a new element is introduced: the concern with preservation of the national labor policy of collective bargaining. *It is not that the introduction of labor policy magically transmutes the agreements otherwise subject to Section 15; rather, it is that it brings into play other, additional values that are of at least equal weight to Shipping Act policy.* Labor policy looks to settlement of issues by the parties themselves under certain ground rules and with as little government interference as possible. *The difficulty with Maritime Commission involvement is not just that it is government involvement, but that it is government involvement by an agency that possesses neither experience nor expertise in labor matters.* Thus it would be desirable for the Commission generally to avoid involving itself in matters arising in collective bargaining." (Italics added.)

In *New York Shipping Association*, supra, the Department of Labor appended a position statement to the brief of the United States which contained the following:

"The Commission's intrusion into the process of collective bargaining is very likely to disrupt the process and deter the speedy resolution of labor disputes in the maritime industry."

Accordingly, both Federal agencies primarily concerned with administration of labor acts and relations and the Government's lawyer-in-chief recognized that the FMC's jurisdiction can and will have very serious consequences to industrial peace in the maritime industry.

Moreover, a review of the federal shipping laws as well as the legislative history behind their enactment lends no support to the position that Congress intended that maritime labor contracts be subject to the FMC's regulatory jurisdiction. As a further bolster to this position, one need only consider the fact that had Congress intended that the FMC regulate labor contracts, it would have provided that maritime labor unions such as the ILA could also be subject to its jurisdiction. In contrast, the federal labor statutes and their legislative histories are replete with references to Congressional intent that collective bargaining be subject to limited supervision by the NLRB and the Labor Department.

The FMC's decision in striking down the Rules on Containers, as implemented in the tariffs, stands as further proof of the FMC's fundamental inexperience in this matter and its inability to flexibly and realistically apply concepts in a maritime antitrust field which it was created to administer. The inevitable result is that meaningful and productive collective bargaining agreements cannot exist under this unduly burdensome regime of multiple federal regulation. The super-imposition of a double-layer of regulatory oversight and edicts clearly runs counter not only to the efficiency and stability contemplated by the Bill before you, but also to the spirit of these times.

Accordingly, in view of the uncertainty rather than the finality that should have followed enactment of H.R. 6613 last year, we further respectfully submit that the Bill before you presents both an opportunity and an obligation to put this matter to rest as well. This can be readily accomplished again by incorporation, by amendment, of provisions to this effect contained in S. 125.

More specifically: this can be done by adding that definition of "maritime labor agreements" as set forth with great precision at Section 102, subheading "15" of that proposed bill, in Section 3 "Definitions" of S. 1593, to read:

"Maritime labor agreement" means any collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but such term does not include an assessment agreement, as defined in this Act[.];"

together with the definition of "assessment agreements," as contained at Section 102, subheading "2" of S. 125; and by providing that assessment agreements, and maritime labor agreements as thus defined, are not required to be filed with the Commission; and by amending Section 8 of this Bill to further provide for exemption of assessment agreements and maritime labor agreements from the antitrust laws.

It must be noted that if the Congress should now unequivocally eliminate FMC jurisdiction over labor agreements the parties and their labor agreements will not be left unregulated. On the contrary, maritime labor relations will remain with those agencies which have developed the requisite expertise and experience, namely, the NLRB and the Department of Labor, under federal labor law, and the Department of Justice and the courts under federal antitrust law.

The inclusion of the foregoing proposed amendments will make this truly an Omnibus Bill that takes into consideration all aspects of the maritime industry. It will insure to a far greater extent than now possible that there will be fair and open competition, more stable labor relations, and therefore a more efficient and competitive atmosphere for improving our foreign trade. To omit these amendments will only invite future problems and uncertainty. It will hold back the realization of the Act's objectives. In the long run it will most probably lead to such amendments when the improvidence of their omission will belatedly be recognized.

The ILA urges this Committee's approval of S. 1593 with these necessary amendments.

Thank you very much.

Senator GORTON. Mr. William St. John, chairman of the National Customs Brokers & Freight Forwarders Association.

STATEMENT OF WILLIAM ST. JOHN, JR., CHAIRMAN, FMC/ICC COMMITTEE, NATIONAL CUSTOMS BROKERS & FREIGHT FORWARDERS ASSOCIATION OF AMERICA, ACCOMPANIED BY GERALD ULLMAN, GENERAL COUNSEL, AND MORRIS V. ROSENBLOOM, DIRECTOR, WASHINGTON OFFICE

Mr. ST. JOHN. Thank you. Mr. Chairman, my name is William St. John, Jr. I serve as vice president and chairman of the FMC/ICC Committee of the National Customs Brokers & Forwarders Association of America, Inc. I am also senior vice president of the forwarding firm of W. R. Zanes & Co., of Louisiana. We would appreciate the inclusion of our written statement into the record.

I am accompanied by our counsel, Mr. Gerry Ullman, and by our managing director of our Washington office, Mr. Rosenbloom.

We speak today to the provisions of S. 1593 dealing with ocean freight forwarders. Our members, as well as our 24 affiliated regional forwarder broker associations in all of the major ports, handle the vast bulk of general cargo exported from the United States by common carriers by water. Ocean freight forwarders perform a vital service of coordinating the shipments to the pier, preparing required shipping documents, arranging for vessel space, and a host of other highly technical activities necessary to effect the exportation of product.

In a September 21, 1981, testimony before the subcommittee, Chairman Green of the FMC noted that the regulatory scheme for forwarders was established in response to widespread abuses in the freight forwarder industry, that the law has proven successful in correcting these abuses, and that the regulation has not imposed an unnecessary burden on the forwarding industry.

We concur with the views of Chairman Green that the law has worked well. Prior to 1961, as several official investigations showed, the industry was plagued with the dummy forwarder set up by unscrupulous exporters to obtain illegal rebates; incompetents, forwarders who received brokerage from steamship lines but performed little or no services, fly-by-night operators with no financial responsibility and persons lacking good moral character.

Due to the efforts of our industry, Congress, after careful study of several years, passed Public Law 87-254 in 1961, providing for the licensing of forwarders, their bonding and the services required to earn brokerage from steamship lines. As Chairman Green noted, the law has indeed been successful and the abuses which plagued all segments of our shipping public were eliminated.

S. 1593, if passed, will result in disasterous changes. With delicensing, many or all of the former malpractices will certainly reappear and a professional body of forwarders will be dissipated. Traditional compensation by carriers to forwarders will be jeopardized. The statutorily fixed $150,000 bond will be catastrophic since it will eliminate a great majority of the small forwarders employing 20 to 25 people or less, and it may also affect many medium firms as well.

We have proposed amendments to S. 1593 in our written statement. Our suggestions will preserve the benefits of the current law to our shipping public and will save many forwarders from extinction. The current law, having worked well for 20 years, we urge the subcommittee not to abandon its basic provisions.

Thank you. We will be happy to answer any questions you might have of us.

Senator GORTON. The centerpoint of your testimony, of course, is that we retain the requirement that freight forwarders be licensed. Obviously, the vast majority of occupations are not licensed. What is there in the freight forwarding operation which compels us in this direction? Do we have to be particularly circumspect of the businessman's financial security or moral character, or both, in this field?

Mr. ST. JOHN. Prior to 1961 the requirements were that licensing was not necessary. Neither was bonding. Without the licensing, people could get into the business, handle freights, and there was no way that they could be removed from the business if it was found that they were doing business in an unscrupulous manner.

Senator GORTON. Customers could stop using them, I assume.

Mr. ST. JOHN. Yes, they certainly could. But the damage would be done if they were in the business and handling the business at all in an unscrupulous manner. The licensing provisons permitted the Government to be able to determine that the person was fit to be in the business, that he understood the business, he was capable of performing the services, No. 1.

It also provided that in order to be licensed, a bond would be placed to see that the firm would have the proper capital to start up the business and to operate the business. These things went along with licensing and were found to be very beneficial to the forwarding industry and to the shipping public.

Senator GORTON. Does licensing limit entry, and therefore limit competition?

Mr. ST. JOHN. No, sir, it does not. Anyone that has the background and experience who can provide evidence of this, who can secure a bond and who is morally fit, can enter. There is no limitation to the entry, except that you be knowledgeable, fiscally responsible, and that you're not an undesirable person or one that has had convictions or things of that sort.

Mr. ULLMAN. I might add, Senator, there's no public convenience or necessity provision in our statute where an applicant would have to show need for his services before he could come into the industry. So it's wide open and there is no restriction. Anybody who shows the qualifications the FMC requires can come in so there is no real limitation of entry.

Senator GORTON. You have just testified in objection to the bonding requirements in S. 1593, but yesterday several shippers associations advocated that freight forwarding bonding requirements be set high as $1 million. They, of course, support the notion that the bond should serve an indemnity function. Are they incorrect in that, and why? What would the effect be?

Mr. ST. JOHN. Well, we believe if the bond was set, even to the $150,000 minimum that you show, many of the firms would not be able to secure the bond. Surety companies would not—or do presently practice, but if they appear on a bond you would probably have to prove two times the net liquid assets in order to secure the bond. We believe a bond at $150,000 would be very damaging because many of the forwarders presently in business would not have those type of liquid assets and that they would be unable to comply with that bonding requirement.

We don't believe that the bond should be an indemnity bond. We believe that the bond and the intent of the legislation before was that the bond would prove that the people had sufficient capital to be in business.

Senator GORTON. How many freight forwarders would there be left with a $1 million bond requirement?

Mr. ST. JOHN. Based on the size, and what we understand of the financial ability of the forwarders, I would say that you would probably eliminate somewhere in the neighborhood of 50 to 60 percent of the forwarders as they exist today, maybe more. A $1 million bond?

Senator GORTON. Yes, that was the question.

Mr. ST. JOHN. I think you would get upward to 90 percent of the forwarders would be out of business. I don't believe we could come up with those type of liquid assets to get bonding at that figure.

Senator GORTON. I think I interrupted your answer to the previous question. If you have more to say, you can do so, or had you completed it?

Mr. ST. JOHN. I think I've completed it.

Senator GORTON. Please explain why you believe the Maritime Commission cannot enforce the amendment to the Shipping Act passed by Congress in July as a part of the reconciliation legislation? That is, a freight forwarder may hold a beneficial interest in the cargo, so long as he receives no compensation for placing that cargo with the carrier.

Mr. **St. John.** This type of provision existed prior to 1961 in General Order 72. At that time it was unenforceable. The amount of shipments that were moving at that time for exportation was probably one-fourth of what moves today. It is our feeling that the carriers would have much difficulty in determining who were shipper-related firms. The recordkeeping would be tremendous. We feel that with that it would be very difficult to police and cover that activity.

Senator **Gorton.** You would like to have that changed, then, I assume? Back to the law——

Mr. **St. John.** We believe that the law, as written today, keeps the forwarder independent. It keeps the forwarder in the business of servicing the exporter, the trader, and we believe that that has been a method of keeping the business of rebating and such things as that out of the business for the past 20 years.

Senator **Gorton.** Did you wish to comment?

Mr. **Ullman.** Well, the problem, Senator Gorton, if you allow exporters to be in the business and you're talking about maybe $2 million shipments handled prior to 1961 and maybe 8 or 10 million shipments today by forwarders, the FMC has indicated last year, and I think they agree today, that there is really no way of trying to enforce the prohibition against receiving brokerage on related shipments. It's just simply unenforceable. I think you already have carrier testimony to that effect, that they pay brokerage out on a computer basis. The name of the forwarder appears in the forwarder block on the bill of lading, and these computers just spit out the checks and pay forwarders, and there is no way the carriers, in a million years, can distinguish between the forwarder who is independent and the forwarder who is export-affiliated. So they are going to be paying out hundreds of thousands, and I daresay millions of dollars of brokerage, which they should not be paying out because they have no way of determining whether it's proper or not.

Senator **Gorton.** Why should freight forwarders be compensated by commission rather than by fees for services rendered? Would not this incline a freight forwarder to place cargo with the carrier who provides a high commission, or with whom he regularly deals, rather than to seek the best deal for the shipper client?

Mr. **St. John.** Well, the marketplace dictates that you're going to seek the best service at the best price for your client. Certainly a forwarder, looking at equal conditions, would favor perhaps a carrier with a better commission to be paid to him. But he does have to handle his business in such a manner that he doesn't jeopardize his client's position and he gives the best service to his client.

Senator **Gorton.** Suppose the Congress were simply to abolish the requirement of tariff filing and enforcement of tariffs. Wouldn't the incentive to set up a dummy forwarder and collect rebates disappear under that set of circumstances?

Mr. **Ullman.** Well, if there are no tariff requirements which would fix the rates for ocean transportation, obviously the thing is wide open and there can be no such thing as rebating anymore. Every shipper would be negotiating his own rates.

As to that proposition, while our association hasn't taken any fixed position, it would seem to me that it would lead to a result where the larger, more powerful shippers can make the best deals whereas other shippers of the same commodity who are competing with those larger shippers are going to be at a rate disadvantage. And starting way back with the Interstate Commerce Act of 1887, it's been our policy to see to it as best we can that all shippers are treated equally as far as rates are concerned, so at least on that level they can remain competitive.

Senator **GORTON**. Thank you very, very much. We appreciate your testimony. As I have said, your full testimony will be included.

Mr. **ULLMAN**. Thank you.

[The statement follows:]

STATEMENT OF WILLIAM ST. JOHN, JR., CHAIRMAN, NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.

Mr. Chairman and members of the Subcommittee, my name is William St. John, Jr. I am Chairman of the FMC/ICC Committee of the National Customs Brokers & Forwarders Association of America, Inc., and Senior Vice President of the forwarding firm, W. R. Zanes & Co. of Louisiana, whose corporate office is in New Orleans.

Our Association has approximately 350 firms in the United States licensed as ocean freight forwarders and/or customs brokers. Affiliated with us are 24 regional forwarder/broker associations doing business in every major U.S. port. The combined membership of the Association and the locals handles the vast majority of general cargo exported from the U.S. via common carriers by water. We speak today to the provisions of S. 1593 dealing with ocean freight forwarders.

1. THE INDUSTRY'S PROBLEMS IN THE PAST

To put our testimony in perspective, a brief review of the forwarder situation prior to 1961 would be helpful. Starting in the mid-1950's our industry was investigated by the General Accounting Office,[1] the FMC's predecessor [2] and by the Merchant Marine Subcommittees of the House and Senate.[3] The Congressional attention was the result of a lengthy investigation of ocean forwarders by Special Subcommittee of the House Merchant Marine Committee which issued a 56-page report in 1956 finding many irregularities and malpractices.[4] A major recommendation was that "an appropriate bill be introduced to provide for the licensing of foreign freight forwarders". P. 56. The reasons for this recommendation are briefly set forth below.

A. The dummy forwarder

The dummy forwarder was a firm established by an exporter under another name for the purpose of illegally collecting a brokerage commission from a steamship line. This practice was a rebate violation of § 16, Shipping Act, 1916. The Special Subcommittee noted that ". . . if this practice redounds to the benefit of the shipper, it is one which offends the rebating provisions of existing law, and tends to discredit the business of forwarding on a full time legitimate basis".[5]

The dummy forwarder placed honest exporters at a competitive disadvantage, it mulcted steamship lines out of substantial revenue and cast the forwarder industry in disrepute for malpractices they did not commit.

B. Incompetents in forwarding

Under the system of regulation prior to 1961, the FMC's predecessor lacked statutory authority to prevent forwarding by incompetent persons. Exporters and ocean carriers suffered thereby. Documentation was improperly prepared, tariffs were misread, shipments were improperly routed and merchandise was confiscated at destination for failure to comply with import requirements.

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[1] Report of Investigation of the Use of Private Export Freight Forwarders, etc., Report No. I-18522, March 1955.

[2] *Freight Forwarder Investigation—Etc.*, 6 F.M.B. 327.

[3] H. Rept. 978, 86th Cong., 1st Sess. (1959); S. Rept. 1682, 86th Cong., 2nd Sess. (1960); S. Rept. 691, 87th Cong., 1st Sess. (1961); H. Rept. 1096. 87th Cong., 1st Sess. (1961).

[4] House Rept. 2939, 84th Cong., 2nd Sess. (1956).

[5] Ibid, p. 55.

C. Unearned brokerage

In the past some shippers would designate a forwarder to receive brokerage payment from the steamship lines even though little or no work was done. One of the reasons, as the GAO report indicated, was that there was "reason to believe that some forwarders make secret kickbacks to officers of the corporation which designate them". p. 43.

D. Lack of financial responsibility

Prior to 1961, there was no requirement that a forwarder make any showing that he had the necessary working capital to operate a business. Thus, fly-by-night operators could offer forwarding services, go bankrupt, leaving the exporter with a loss of freight moneys given to the forwarder for transmittal to the carrier.

E. Forwarding by undesirable persons

There being no requirement prior to 1961 in the law that a forwarder need be a person of good moral character, anybody could enter the business with the regulatory agency unable to remove them even when such persons committed serious crimes.

2. SPONSORSHIP OF LICENSING LAW BY FORWARDERS

As a result of the malpractices disclosed in the various investigations, the organized forwarding industry itself determined to clean house by sponsoring a bill with a two-fold purpose. By requiring that the forwarder be "independent", shipper-connected firms receiving indirect rebates through brokerage payments to a dummy forwarder would be eradicated. Requiring a forwarder to be licensed upon a showing of being "able" to render forwarding services weeded out incompetents. The provision that a forwarder must book or secure the cargo, or arrange for its space and perform two additional services eliminated unearned brokerage. A bond in the amount to be fixed by the FMC guaranteed that an applicant for a license was able to persuade a surety company that it possessed adequate working capital to operate. Finally, in mandating that a forwarder be "fit", licensees would have to be persons of good moral character. In 1961 P.L. 87-254 was passed incorporating these salutary provisions.

3. BENEFICIAL RESULTS OF A LICENSING LAW

The experience since then has been gratifying. The exporting public is assured that the forwarder-licensee is qualified, of good character, financially sound, and free of shipper connections. Forwarders have achieved a professional status and have made a substantial contribution to our export commerce.

Relationships with the steamship industry have been excellent. Brokerage paid to forwarders is earned and we are not aware of any complaints in the last twenty years by carriers. The FMC describes our industry as an "intergral part" of the commerce of the United States.[6] The Senate Commerce Committee has called us "a highly important segment of the economy of the United States".[7]

4. NEGATIVE IMPLICATIONS OF S. 1593

This bill, if passed in its present form, will result in disasterous changes in our industry. By eliminating licensing, a body of professional forwarders skilled in their trade will disappear. We will necessarily return to the days when anybody could hold himself out as a forwarder and handle shipments without any technical competence.

By eliminating the prohibition against a shipper connection in the definition in § 3(14), the dummy forwarder will soon reappear. It is only a matter of time before unscrupulous shippers seeking to increase their revenue will form forwarding firms and thus obtain illegal rebates. Such a result would be entirely contrary to the soponsor's introductory statement when he said that the bill "reaffirms strong protection of shippers against discriminatory, prejudicial, unfair or deceptive practices".[8]

It is no answer to say that § 11(c)(4) of the bill will prevent the reappearance of the dummy forwarder. That section provides that no forwarder is entitled to receive compensation from a common carrier with respect to any shipment in which the forwarder has a direct or indirect beneficial interest. The regulations of the industry prior to 1961 contained a similar prohibition[9] but it did not, as indicated above, prevent unscrupulous shippers from collecting illegal brokerage. The FMC's predecessor could not enforce the prohibition then and with several million more shipments being handled by forwarders, the FMC cannot, assuredly, enforce such a restriction now. Nor do steamship lines have either the time, the inclination or the manpower to police this section. The inevitable result: wholesale violations.

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[6] *Freight Forwarder Investigation—Etc.*, supra, p. 334.

[7] S. Rept. 691, supra, p. 3.

[8] Cong. Record—Senate, S. 9231, 8/3/81.

The provision in §11(a) for a bond approved of no less than $150,000 will be catastrophic. Surety companies usually require a showing of net assets of at least two times the amount of the bond. This would mean that a forwarder would have to have assets of $300,000 before he could obtain a bond from a surety. We state as emphatically as we can that *this bond amount will eliminate the great majority of small forwarders,* employing 25 people or less, who are the bulwark of the industry and many medium sized firms as well. Entry into forwarding by young and able persons would be virtually impossible. Only people with substantial wealth could become forwarders. This is not deregulation but overregulation that will decimate our industry.

If the purpose of a bond is thought to be to indemnify exporters or carriers in the event of a default by a forwarder, the bond amount would have to be many times the $150,000 provision. We believe—as did Congress in 1961—that the purpose of a bond is to establish in the first instance that one who seeks a license as a forwarder has adequate working capital. A bond of not less than $150,000 seems to be intended as an indemnity to make persons whole in the event of a forwarder default. Exporters have no such protection when a steamship line or others who render services go bankrupt. If we total up the amount of defaults in the last year or two by steamship lines, they would far exceed the total defaults by forwarders in the last twenty years.

Fixing the amount of the bond should be left to the expertise of the FMC. Under the new regulations that become effective on October 1, 1981 (46 CFR Part 510) the bond will be $30,000 with $10,000 added for each unincorporated branch office. This provision offers a reasonable measure of protection to our exporting public while at the same time makes it possible for smaller forwarders to continue and new applicants to enter the industry.

The provisions of §11(c) for compensation of forwarders by carriers will create problems. Payment is authorized when the forwarder has "engaged, reserved, or contracted directly" with the carrier for space. Such wording is too narrow and contemplates a formal negotiation between the forwarder and carrier which does not in many instances take place. For example, in general cargo ports it is the practice of the forwarder to send a 500 pound package to the pier of a carrier he selects without prior contact with the line. Unquestionably, the forwarder has given patronage to that line and should be compensated. But under the language in §11(c) it could be argued that the forwarder has not engaged, reserved, or contracted for space. The bill will, therefore, produce uncertainty in its application, exacerbation between carriers and forwarders, which does not presently exist, and the denial of earned compensation.

5. PROPOSED AMENDMENTS TO THE BILL

Using the present format, we are respectfully attaching hereto suggested changes in S. 1593 beneficial to all segments of our export trade. Briefly, these changes are as follows:

§3(14) defines "ocean freight forwarder" so as to prevent the resurgence of the dummy forwarder. There is simply no other way to deal with the problem except to prohibit a forwarder from having a shipper connection.[10]

§11(a), as re-drafted, retains the licensing of forwarders. Twenty years of experience has conclusively shown that licensing does not curtail entry and has provided exporters, particularly the smaller ones, and ocean carriers with a professional body skilled in the trade, financially responsible and morally fit. Our export commerce can hardly be enhanced by allowing the vital function of forwarding to be performed and the handling of millions of dollars of exporter moneys by an incompetent or a convicted felon.

The bond provision of no less than $150,000 has been eliminated since it would, as stated above, virtually destroy the industry as we know it today. We cannot believe that the sponsors of this bill wish to see our shipping public served by only a handful of forwarders wealthy enough to meet this requirement. The alternative for a forwarder is to seek financing from undesirable sources, hardly a result that the Subcommittee should encourage.

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[9] General Order 72, §244.13.

[10] In this connection, we suggest that the Subcommittee report make it clear that upon enactment the provisions of §1607 of the Omnibus Budget Reconciliation Act of 1981 allowing a forwarder to have an exporter affiliate are being replaced.

The provision for compensation of forwarders by carriers, § 11(d), has been clarified to avoid arguments between forwarders and carriers and a denial of compensation when earned. The phrases in the current law of "book or secure the cargo" or "arrange for space" are well known, would not require interpretation, as would "engage, reserve or contract", and would continue the amicable relationship between forwarders and carriers existing for two decades.

Finally, § 11(c)(3) has been clarified so that it does not lend itself to the interpretation, as it would presently appear to do, to prohibit an ocean carrier from paying its steamship agent for a steamship agency function.

6. CONCLUSION

The current forwarder provisions of the Shipping Act, 1916, having worked well for twenty years, should not be abandoned. We believe that other segments of the shipping industry will confirm our view. A good law being on the books, why change it?

We appreciate the opportunity given to us to present our views and we are, of course, pleased to respond to any questions you may have.

Thank you.

Proposed Revisions of Ocean Freight Forwarder Provisions of S. 1593

Sec. 3. Definitions.

As defined in this Act—

* * * * * * *

(14) "ocean freight forwarder" means a person in the United States who—

(A) dispatches shipments via ocean common carrier;

(B) processes the documentation or performs related activities incident to such shipments; and

(C) is not a shipper or consignee of shipments from the United States, has no beneficial interest therein, and does not, directly or indirectly, control or is not controlled by any shipper, consignee or any person having a beneficial interest in the shipment.

* * * * * * *

Sec. 11. Ocean Freight Forwarders.

(a) License Requirement—No person shall act as an ocean freight forwarder unless licensed by the Commission. A license shall be issued to any person found by the Commission to be qualified by experience and character to render fowarding services. A person whose primary business is the sale of merchandise may forward shipments of such merchandise for his own account without a license.

(b) Bonding Requirement—No person shall be licensed as an ocean freight forwarder unless he has furnished a bond approved by the Commission that is issued by a surety company acceptable to the United States Treasury Department in such form and amount as in the opinion of the Commission will establish financial responsibility and the supply of services to exporters in accordance with contracts, agreements, and arrangements therefor.

(c) Effectiveness of License—A license may, after notice and hearing, be suspended or revoked by the Commission for willful failure to comply with any provisions of this Act or any rule or regulation promulgated thereunder. All licenses issued prior to the effective date of this title shall be deemed issued under this title.

(d) Compensation of Forwarders by Carriers—

(1) An ocean common carrier shall compensate an ocean freight forwarder in connection with any shipment dispatched on behalf of others only when the ocean freight forwarder has certified in writing to the carrier that it has performed the following services:

(A) booked or secured the cargo for the vessel or arranged or confirmed the availability of space, and

(B) prepared and processed the ocean bill of lading, the dock receipt, or other similar documents with respect to such cargo.

(2) An ocean common carrier shall not pay compensation for services rendered described in paragraph (1) more than once for the same shipment.

(3) An ocean common carrier shall not pay compensation as provided in this subsection to its agent if licensed as an ocean freight forwarder or any other common carrier or its agent.

(4) No compensation shall be paid to an ocean freight forwarder except in accordance with the tariff provisions contained in Sec. 9(a).

Senator GORTON. Mr. Ed Schmeltzer, counsel for Behring International.

STATEMENT OF EDWARD SCHMELTZER, COUNSEL FOR BEHRING INTERNATIONAL

Mr. SCHMELTZER. Good morning. My name is Edward Schmeltzer. I am appearing here today on behalf of Merrill P. O'Neal, president of Behring International, Inc., whose statement has already been presented to the committee, and we hope enters the record in this proceeding.

Senator GORTON. It will be included.

Mr. SCHMELTZER. Mr. O'Neal is in Houston and unable to attend these hearings himself. He has asked me to apologize to the committee and has authorized me to answer questions on behalf of Behring.

I will not read the statement that has already been presented to Mr. Spilsbury, but would like to make a few summary remarks and thereafter answer any questions the committee may have.

Behring has been in the ocean freight forwarding business since 1917, and it has offices in 20 cities in the United States and many areas overseas. Its business relationships enable Behring to identify opportunities for the sale of U.S. products abroad. The sources for many of the products that Behring finds can be sold overseas are relatively small American manufacturers who either do not have the expertise or cannot take the trouble to export or who find it difficult to finance their own shipments. Behring is able to complete such transactions because it has exporting expertise and the ability to finance the shipments.

Mr. O'Neal believes that the additional exports that can be generated by freight forwarders who are exporters or who finance shipments is too important to the export commerce of the United States to be thwarted by artificial regulatory restrictions which prohibit freight forwarders from taking a beneficial interest in shipments, whether or not they receive compensation from the carriers on those shipments. Behring believes that the return it will receive from exporting or financing shipments will enable it to operate the exporting part of its business profitably, without receiving compensation from ocean carriers on its own shipments, or shipments it finances.

Behring also believes that prevention of compensation from ocean carriers to forwarders on shipments in which the forwarder has a beneficial interest will not be more difficult to police than under the system that existed in the past. In order to prevent the possibility of rebates, it's only necessary that the statute to be passed or FMC regulations require two things: First, that forwarders promptly report to the FMC any relationship with shippers they may now have or that they acquire in the future, that is, when they acquire them; second, that freight forwarders, in order to collect compensation, certify to the carrier that the shipment for which compensation is requested is not one in which the forwarder or its related company has a beneficial interest.

This kind of policing is not difficult. You were told earlier that carriers would not know when shippers were related to exporters. Regulation by certification is what has, in fact, existed for the past

20 years, and this would simply be a continuation of regulation by certification. That is, the forwarder would have to certify, under our proposal, that it is not related to the shipper of the particular shipment involved. That's no more difficult than a forwarder now certifying that it has performed certain documentation functions or has secured cargo for the ship.

Behring is especially interested in forming an export trading company of the kind described in S. 734, which passed the Senate on March 18, 1981, and is now pending in the House of Representatives. The committee report on that bill, that is Senate Report 97-27, recites the importance of facilitating the exportation of the goods produced by tens of thousands of small- and medium-sized producers who are not presently in a position to ship their goods overseas. That's where American exports can be increased, by having experts go to the thousands of companies out there who don't know about exporting and saying, "We will buy your goods from you. We will find markets for you." Behring is in a wonderful position to do this, as are many other forwarders in the United States.

They are in this position because of a number of things. First, they have strong overseas connections. Second, they know the export business. Third, they deal daily with ship lines, banks, U.S. manufacturers, and overseas customers, insurance companies, and other businesses that constitute the export community. Fourth, they have purchasing departments, and Behring has a purchasing department which has functioned for years. Fifth, Behring is presently an importer. Sixth, Behring wants to export. Many other forwarders do.

I thank you for the opportunity to present these remarks, and to present Mr. O'Neal's statement. If you have any questions, I'd be glad to try to answer them.

Senator GORTON. Could you explain the way in which Behring would participate with a bank in an export trading company?

Mr. SCHMELTZER. In the absence of new legislation banks cannot participate fully in export trading companies. What Behring would probably do, or would seek to do—would form a separate company as a joint venture with a bank. The banks would—itself have overseas connections, and the banks would facilitate financing. Under the Export Trading Company Act, the banks could not lend money at lower rates or treat customers of the export trading company differently than they treat other customers. But there would be an easy facilitation where a freight forwarder and a bank would be part of an export trading company, and this would make financing of shipments much easier.

Senator GORTON. Why shouldn't we require that an organization that wishes to participate in an export trading company be separate and distinct from a freight forwarder? Doesn't joining functions under one roof simply mean that the freight forwarder will be handling not only its own goods but handling its goods in direct competition with those it is handling for an independent shipper?

Mr. SCHMELTZER. You know, you were talking before about limiting entry. One rule that would limit entry, would be to keep people who want to export from being forwarders. Why should Behring be driven out of the freight forwarding business because it wants to be an exporter? The answer is it shouldn't. As far as Behring's customers go, Behring's customers are basically people who now are in the export business. Behring doesn't want to compete with them. It would be foolish for it to do so.

What Behring wants to do is handle shipments itself which its customers don't want to handle. It wants to find American manufacturers who are not in the export business now, but who would get into the export business if the expertise and the financing were available to them. I hope I have answered your question.

Senator GORTON. Well, you have certainly indicated what your client would like to do and how it might be facilitated by this legislation. Now, you do agree with the Freight Forwarders Association that licensing of freight forwarders is useful. Can you explain how or what valuable purpose it serves? Does it actually lead to enforcement against violations of the act?

Mr. SCHMELTZER. Yes. I think that the national association covered that ground well. I was involved pretty deeply with that. I was in the Federal Maritime Commission in 1961, when the Freight Forwarder Act was passed. It seems to me that if the act is not enforced in too picky a way, too technical a way, it's a fine act. There are very few people at the headquarters of the Maritime Commission who work in the freight forwarder field. I don't think there are more than 10 people, including general counsel, hearing counsel, and staff people who take care of all freight forwarder matters.

It's an act that is not very difficult to enforce. Because it doesn't limit entry, you don't have a lot of the problems that you used to have under the Interstate Commerce Act.

Senator GORTON. Do you think a $150,000 bond would be essentially prohibitive in the profession?

Mr. SCHMELTZER. Yes. Let me say that I'm speaking for myself rather than Behring now, simply because I haven't checked this out with Behring.

No matter how big a bond you have, it isn't big enough to catch a forwarder who has gotten involved in falling behind in his payments to steamship companies. The Commission had a regulation that very effectively prevented that kind of thing. The regulation was that within 7 days of the time a freight forwarder got his check from his customer; that is, from the shipper, the freight forwarder had to pay it over to the ship line. For some reason that I don't understand, except some general theory of deregulation, the Commission in the past year eliminated that requirement.

Now, that's the kind of thing that protects shippers and carriers from having their moneys dissipated by a forwarder who is later to go bankrupt. It's not a bond. Bonds can't be big enough unless they go to millions of dollars. So a modest bond, coupled with the requirement that prevents a freight forwarder from getting behind in sending shipper's checks to carriers is what's needed to make sure that the moneys of shippers and carriers are not dissipated. The bonds of large size are almost impossible for small forwarders to get. If you want to limit entry into a field, the way to limit it is to have a $1 million bond. Even a $150,000 bond is a tough one to obtain for a small forwarder.

Senator **Gorton**. Mr. Schmeltzer, thank you very much. Your testimony has been most helpful to us. We may have other questions, as may Senator Inouye.

Mr. **Schmeltzer**. We'll be glad to answer them. It's a pleasure to have been here.

[The statement follows:]

STATEMENT OF BEHRING INTERNATIONAL, INC.

1. Behring International is a licensed custom house broker and an authorized international freight forwarder licensed by various agencies, including U.S. Customs, the U.S. Federal Maritime Commission, the U.S. Civil Aeronautics Board and the International Air Transport Association.

Our Company was established in 1917 as Behring Shipping Company, merged in 1963 with South Ports Forwarding Company to form Behring-South Ports Shipping Company, Inc. Our name was changed in 1971 to Behring Intenational, Inc.

Behring operates its own offices in twenty cities in the U.S. and internationally, in Dubai, Saudi Arabia, Abu Dhabi, Paris, Singapore, London, Manila, Lima, Egypt, and, beginning in January of 1982, in Caracas. Behring has over 1,000 full-time employees around the world, generating annual revenes of nearly $200 million. Behring offers a broad range of services to its customers, including ocean and air freight forwarding, customs, non-vessel operating common carrier by water, purchasing and expediting, warehousing and export packing.

A comprehensive description of the services provided by Behring can be found in the accompanying brochure. Subsidiary and affiliated companies are:

Behring International Export Packers, Inc.—Houston
Behring International Freight (U.K.) Ltd.—London
Behring Overseas Corporation—Houston
Panaircraft Services, Inc.—Houston
Behring International Singapore (Pte.) Ltd.—Singapore
Behring International S. A. R. L.—France
Strategic Transportation Company, Inc.—Houston
Behring Overseas Philippines Corporation
Behring/Caravan—Saudi Arabia
Worldwide Material Services, Inc.—Houston

Serving many industries over the years, such as construction, heavy machinery and equipment, electronic, petroleum and communications, as well as those involving government contracts, we have moved millions of tons of industrial cargo.

Behring appreciates the opportunity the Committee has given us to comment upon S. 1593.

Behring supports those sections of Senator Gorton's bill which would enable a freight forwarder to take a beneficial interest in goods and, therefore, act to facilitate and stimulate the export trade efforts of the United States. We feel that Senator's Gorton's bill, in conjunction with the Export Trading Company legislation currently in committee in the House, will allow freight forwarders to assist U.S. manufacturers in successfully marketing their goods overseas.

2. We believe that the licensing, bonding and regulatory provisions in Section 1 and 44 of the Shipping Act, 1916 (those sections concerning ocean freight forwarders), have as a general matter worked reasonably well, helped to prevent rebating and assured shippers that freight forwarders will be competent to perform their export functions.

3. It is, however, the view of Behring, based on experience and careful study, that it and many other ocean freight forwarders or their related companies are especially well equipped to participate as traders in the export commerce of the United States; that the products of many small American manufacturers would find export markets and the export commerce of the United States would increase significantly if ocean freight forwarders were allowed to trade; and that a simple prohibition against collection of compensation by ocean freight forwarders on their own shipments or shipments of related companies would be sufficient to prevent rebates to forwarders who export or are related to exporters. This could be accomplished either by making permanent the amendments to the Shipping Act effectuated by Section 1608 of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, signed into law by the President on August 13, 1981 or by enacting Section 11 of S. 1593 which prohibits a freight forwarder from collecting compensation from carriers on goods in which it has a beneficial interest. In order to assure compliance with this prohibition, we suggest the further requirements that ocean forwarders (1) certify to ocean carriers from whom they claim compensation that the shipment involved is

not one in which the ocean forwarder or its related company has an ownership or beneficial interest and (2) notify the Maritime Commission promptly of shipper connections.

4. These changes in the beneficial interest rule would enable Behring or any other forwarder to function as an export trading company. A bill to encourage export trading companies is now pending in Congress. That bill, S. 734, which passed the Senate on March 18, 1981 should greatly facilitate export trading companies. Senate Report No. 97-27, accompanying S. 734, described the purpose of the legislation, in part, as follows: The purpose of the legislation is to improve U.S. export performance by facilitating the creation of U.S. export trading companies which could perform export services for tens of thousands of small and medium-sized American producers. Despite the success of trading companies as "export middlemen" for European, Japanese, and Korean producers, such companies have been slow to develop in the U.S. due to deterrents presented by banking regulations, antitrust uncertainties, and the traditional insularity of the U.S. market. This legislation modifies provisions of existing law which have acted to discourage the establishment or expansion of export trading companies, and offers modest incentives to the development of such companies."

The former prohibition under the Shipping Act of relationships between ocean freight forwarders and exporters, or persons having a beneficial interest in export shipments, is precisely the kind of "deterrent" that has inhibited the development of export trading companies in the United States. It is this deterrent that Behring is requesting the Committee to remove permanently.

5. Behring's representatives constantly develop trading opportunities, many of which are not brought to fruition either because the large United States exporters who are Behring's customers are not interested in the business (usually because the sales would not be large enough) or because a United States producer who wants to develop a foreign market lacks expertise or is not capable of financing the sale. Behring would like to pursue these opportunities by forming an export trading company, either alone or in a joint venture with an American bank. Behring has identified potential export sales opportunities in which it would be interested, for example, sales in American oil field machinery and machine parts to the oil producing nations of the world and sale of specialized cranes to nations which are now developing their manufacturing capabilities. The suppliers from whom the Behring export trading company would purchase for its export sales would generally be relatively small companies producing specialized equipment.

6. Behring perceives a tremendously large untapped export market for U.S. goods. Whereas most industrialized western countries export in the 25 percent range of their gross national product, the U.S. consumes internally all but about 7.5 percent. Only 8 percent of the 250,000 U.S. manufacturing companies ship their goods abroad with 100 industrial giants accounting for one one-half of the total export. A freight forwarder like Behring with a large and encompassing domestic and international network of offices providing freight forwarding, non-vessel operating common carrier by water, purchasing and expediting, transportation, communication and export packing services and with established financial and marketing data and contacts, would be extremely helpful in bringing an important sha[illegible] that other 92.5 percent of U.S. gross national product to the export market.

To lend support to U.S. manufacturers in the export of their goods, the supporting entity would require the capability of taking a beneficial interest in those goods. The interest may range from an advancing of funds to taking title on a purchase and resale basis. Expressed another way, to lend such support, the supporting entity would be a trading company with the ability and flexibility to act in a broad spectrum from the situation of a short run trader or broker working essentially on commissions to a true international export trader offering complete services from the manufacturer's front door to the end user's door overseas.

7. U.S. Export Trading Companies may be defined as organizations formed specifically to facilitate the export of goods and services produced in the United States.

The "package" of services that might be offered to manufacturers by an export trading company are financing, marketing and sales, insurance, warehousing, transportation, documentation, and overseas servicing. In this sense, an export trading company represents simplified "one-stop" exporting capability for manufacturers who, for whatever reason, are not currently exporting their product.

In addition, the export trading company should be capable of taking title to the goods that it trades, thus acting as the vendor to the overseas buyer and not simply as commission merchant.

Of the services listed above, one of the most significant is the transportation component and it is in this area that freight forwarders can play a vital role by putting to use years of accumulated experience in getting cargo from origin to determination efficiently and economically.

At Behring International, we look upon ourselves as not simply freight forwarders preparing documents and arranging for carriage, but as cargo managers responsible for providing a complete and highly specialized export service. This involves inland routing via the most economical means; material receiving and inspection; warehousing; export packing and containerization; banking coordination and insurance; foreign port clearances and delivery. In other words, a highly specialized export service that completely coordinates cargo movement from the Buyer's down to the Seller's door in the most efficient and economical manner.

If the export trading company legislation is designed to promote U.S. products abroad through facilitation of the exporting process then logically the freight forwarder should be permitted to participate as a full partner in the venture. By permitting the freight forwarder to take a beneficial interest in certain shipments, while ensuring that the problem of illicit rebating is solved by not permitting payment of brokerage by an ocean carrier, the legislation ensures that the expertise of freight forwarders is used to the utmost advantage in promoting U.S. exports.

8. Participation in the export trading company would not intrude on the fiduciary relationship between Behring and its customers. The reason Behring is interested in becoming an export trading company is that the exporters with whom it deals as a freight forwarder have no interest in the specialized kind of business that Behring would handle as an export trading company. Behring, moreover, would not compete with its customers who are direct producer/exporters of goods shipped to foreign countries or are engineering and development companies who ship to their own overseas projects.

9. There would be no substantial incentive on the part of an ocean forwarder to collect compensation from ocean carriers on the shipments of its related companies. Behring as an ocean freight forwarder must claim compensation from carriers to help offset the cost of providing specialized ocean freight forwarder services. The economics would be completely different on shipments made by Behring as an export trading company. On its own export shipments, Behring would seldom earn below 10 percent of the sales price of the merchandise. In contrast, compensation from ocean carriers normally ranges from 1.25 percent to 10 percent of the ocean freight and 2.5 percent would be a reasonable figure to assume as average compensation. A further reasonable assumption is that ocean freight normally constitutes 10 to 30 percent of the sales price of United States ocean export shipments. Thus, on a $10,000 sale, Behring as an export trading company would not earn less than $1,000. On the same sale, an independent ocean freight forwarder would receive, on the average, 2.5 percent of 10 to 30 percent of $10,000 or between $25.00 and $75.00. Thus, there would be little incentive for a forwarder who is also an export trading company to chance violating the law for the small amount of freight fowarder compensation involved.

10. In conclusion, Behring wants to expand its activities in the export trading field in which it claims expertise, and believes that it and other similarly qualified concerns could make a major contribution to the economic growth of the United States if it is allowed to do so.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. Why can't Behring arrange sales of American products to overseas companies without itself being an exporter or taking a beneficial interest in the goods shipped?

Answer. Many of the small or medium-sized manufacturers whose products could be exported do not want to become involved in the details of overseas selling or financing their shipments. The products of such companies, therefore, can only enter the export market if they are purchased FOB plant or title passes in a place in the United States. The overseas buyers with whom Behring is in contact require CIF or C&F bids. That is, these buyers want to purchase American products that are delivered to a place in their own countries. What is missing is a middleman exporter who will either finance the shipments or purchase the goods FOB U.S. plant and sell them at a port or point of delivery in the foreign country. It is not feasible for Behring or any other export middleman or financing company to take the financial risk involved unless it has a beneficial or security interest in the goods. Very few firms now exist who operate as export middlemen for general merchandise (as opposed to commodity traders). Thus, if Behring is to arrange for sales abroad of the merchandise of small and middle-sized manufacturers in the United States, it must be free to take a beneficial interest in the goods shipped.

Question 2. Would licensing of ocean freight forwarders who are related to shippers open the door to rebating?

Answer. The licensing of ocean freight forwarders who are related to shippers would not open the door to rebating if amendments to the Shipping Act or the Federal Maritime Commission's regulations included one simple reporting requirement and one simple certification requirement. Ocean freight forwarders who are related to shippers should have to notify the Commission promptly of all shipper relationships and the law should require that every request for carrier compensation include a certification that the forwarder is not related to the shipper nor to anyone having a beneficial interest in the shipment involved. Thus, carriers would not pay compensation unless they received such a certification. The Commission could take action against the license (assuming licensing of forwarders continues) of any forwarder who claims compensation on shipments of related companies or who fails to notify the Commission of shipper relationships. FMC investigators could spot-check claims for forwarder compensation against the list it maintains of shippers related to the forwarder involved.

Under existing legislation, shippers may dispatch their own shipments without a license, but may not receive compensation from carriers on such shipments. The forwarder would be placed in the same position with respect to its own shipments or shipments of related companies, but would be free to receive compensation on shipments it handles for others. Under these circumstances, licensing of ocean freight forwarders who are related to shippers or financers of the goods shipped would not open the door to rebating.

Question 3. Is Behring the only ocean freight forwarder favoring elimination of the beneficial interest prohibition?

Answer. I have been requested to inform the subcommittee that Universal Transportation Corporation, a subsidiary of Transway International Corporation, takes the same position as Behring International, Inc. in favor of elimination of the beneficial interest prohibition. In addition, I have polled the five forwarders represented by our firm (in addition to Behring) and have been informed that two of them favor elimination of the prohibition against licensing forwarders with shipper relationships and the remaining three have no objection to it, *i.e.,* they believe that neither they nor other freight forwarders would be harmed by elimination of the prohibition so long as forwarders are prohibited from receiving compensation from ocean carriers on shipments of related companies. The ocean freight forwarder firms we polled range from among the smallest to the largest ocean freight forwarders in the country.

Senator GORTON. Mr. Peter Ruffin of Southern Overseas Corp. Mr. Ruffin, would you introduce your associates and proceed with your statement?

STATEMENT OF PETER RUFFIN, CHAIRMAN OF THE BOARD, SOUTHERN OVERSEAS CORP., ACCOMPANIED BY LEM DOSS, PRESIDENT; LOUIS WALLACE, VICE PRESIDENT; SAM ROSS, VICE PRESIDENT; AND J. ALTON BOYER, COUNSEL FOR FILLETTE GREEN & CO. OF TAMPA, SMITH & KELLY CO., SOUTHERN OVERSEAS CORP., SOUTHERN SHIPPING CO., AND WATERS SHIPPING CO.

Mr. RUFFIN. Thank you very much.

At the outset, I'd like to say I have a partial statement which I would like to be included in the record in addition to the formal statement which we have already submitted.

Senator GORTON. It will be included in the record.

Mr. RUFFIN. I am Peter B. Ruffin, chairman of the board of Southern Overseas Corp. of Wilmington and Morehead City, N.C.

I am accompanied at this table by Lem Doss, president of my company; Louis Wallace, vice president of Southern Overseas; Mr. Sam Ross, vice president of Southern Shipping Co. of Savannah, Ga., and Charleston, S.C.; and Mr. J. Alton Boyer, counsel for our group.

Although not represented here at the table, our group also includes Waters Shipping Co. of Wilmington and Morehead City, N.C.; Smith & Kelly Co. of Charleston, S.C., and Savannah, Ga.; and Fillette Green & Co. of Tampa, Fla.

Each of the companies in our group is a licensed independent ocean freight forwarder and also acts as a ship's agent or wishes to preserve its right to do so. I personally have been in the business of acting as a freight forwarder and ship's agent for almost 40 years. We are here to testify principally about section 11(c)(3) of S. 1593 which provides that an ocean common carrier by water shall not pay freight forwarder compensation to its agents or any other ocean common carrier or its agents.

No explanation or reason for this provision has been given, and we are not certain either as to its scope or purpose. We are concerned, however, that if enacted without clarification, it would be given the effect of driving legitimate freight forwarders out of the ship's agency business or ship's agents out of the freight forwarder business. There is no reason for this, and it would benefit only our competitors.

It is commonplace throughout the ocean forwarding industry for freight forwarders also to engage in other maritime-related businesses such as customhouse brokers, warehousemen, stevedoring, non-vessel-operating common carriers, as well as ship's agents. This is particularly true in the ports in which we operate which are smaller ports where the business realities are such that we could not survive just as freight forwarders on the one hand or a ship's agent on the other.

The committee should know that the provision in question would reverse a decision deliberately and thoughtfully made by Congress when the present licensing law was before the Congress in 1960 and 1961. At that time, the former Federal Maritime Board had proposed that freight forwarder licenses and forwarder compensation be denied carriers and their agents. Congress rejected these suggestions. The only limitation upon licenses was with respect to shippers and shipper affiliates.

In the intervening 20 years, licensee/agents have operated as FMC licensed forwarders as well as in the business of providing agency services to shipowners and operators, fully subject to FMC regulation and without a single blemish upon their regulatory record.

In this period, there has not been a single complaint by any shipper or consignee or carrier to the FMC and not a single complaint issued by the FMC directed to their status as both forwarders and ship's agents. Not only are we unaware of any such complaints ourselves, but we have searched the records of the Federal Maritime Commission under the Freedom of Information Act and found none.

Under these circumstances there should be a compelling reason to change the law. None has been stated in the record of the House and Senate hearings in 1979 and 1980, and we believe there is none.

Forces of the marketplace provide ample regulation of their own and have done so without significant problems for 20 years. Both shippers and carriers can simply take their business elsewhere if they do not wish to deal with a licensee/agent.

I might mention that in an FMC rulemaking proceeding in which the same issue was raised, we were met for the first time with an argument that this provision would do away with dual compensation of licensee/agents for identical functions. That is simply wrong, because it mistakes the nature of the ship's agency business—the many, many tasks which it entails—and the freight forwarder function.

We are paid for specific tasks as ship's agents; we are paid for different ones as freight forwarders. In an attachment to our prepared statement, you will find a detailed list of the tasks involved. And, as a final answer to that argument, I would point out that if section 11(c)(3) were enacted, the same number of dollars for a given transaction would be paid out as brokerage and ship's agency fees—but to two different companies rather than one, with no resultant savings to the carrier or shipper. And, in fact, since it would cause the licensee/agent to eliminate one business or the other, it would cut down competition in the port.

In a time and under a national administration pledged to deregulation and a bill, S. 1593, designed to deregulate the forwarder industry, section 11(c)(3) would be a step in exactly the opposite direction. If passed, it would threaten the destruction of our livelihoods upon no record of abuse and no demonstration of a need for additional regulation at the same time the rest of the industry would be deregulated. We cannot believe that the committee intends this result.

We therefore strongly request that section 11(c)(3) be deleted from S. 1593 or clarified in a way to make it certain that it is not intended to apply to bona fide independent forwarders if licensed under the present law or bonded or otherwise qualified under a new law. We have submitted a written statement in which we suggest an amendment to section 11(c)(3), if it is not deleted altogether; and we would be pleased to answer any questions the committee may have.

On a separate matter, we note that in the written statement of a witness who appeared earlier this week, it was suggested that the definition of common carrier in section 3(5) be amended to include ship's agents and anyone else who participates and engages in transportation by water in foreign commerce. The suggestion was not made in the context of the freight forwarder provisions with which we are concerned, and we do not know its purpose.

It would appear to us, however, that such a provision would vastly enlarge the FMC jurisdiction in a way for which no justification has been shown or exists in fact.

Mr. Chairman, that completes my statement, and we would be glad to attempt to answer any questions which you may have.

Senator GORTON. Mr. Ruffin, in connection with your primary concern which brings you here, your position is very forceful, and it's very likely that the committee is going to accede to it. At this point, for that reason, we don't have any questions for you here today. We may as we look into it wish to submit questions to you in writing, and of course Senator Inouye might wish to do the same thing.

But with that, we appreciate your coming here. You made a very good presentation.

Mr. RUFFIN. Thank you for your courtesy, Senator.

[The statement follows:]

STATEMENT OF LICENSED INDEPENDENT FREIGHT FORWARDERS IN SOUTH ATLANTIC AND GULF PORTS

This statement is filed in behalf of licensed independent ocean freight forwarders in South Atlantic and Gulf ports. They include:

Southern Overseas Corporation: Wilmington and Morehead City, North Carolina.
Waters Shipping Company: Wilmington and Morehead City, North Carolina.
Smith & Kelly Company: Charleston, South Carolina, and Savannah, Georgia.
Southern Shipping Company: Charleston, South Carolina, and Savannah, Georgia.
Fillette, Green & Co. of Tampa: Tampa, Florida.

We understand that Southern Steamship Agency, Inc., also joins in these comments. That company is an applicant for a forwarder license, and proposes to engage in forwarding in Panama City and Pensacola, Florida; Pascagoula and Gulfport, Mississippi and Georgetown, South Carolina.

Each of the companies named also engages in the business of acting as a ship's agent, as well as the forwarding business, or wishes to preserve its right to do so. None has any ownership affiliation with any common carrier by water. We hold forwarder licenses from the Federal Maritime Commission, in good standing; we have been found to be "fit, willing and able"; and there is no blemish on our regulatory record.

It is commonplace throughout the ocean forwarding industry for freight forwarders also to engage in other maritime-related businesses. This is particularly true in the ports in which we operate, which are smaller ports in which conditions are vastly different from the ports principally represented, for example, by the National Association of Customs Brokers & Freight Forwarders, Inc. We note parenthetically that even that Association's title combines forwarding and customs brokerage.

Our concern is directed to Section 11(c)(3) of S. 1593 (and the corresponding provision in Section 605(d) of S. 125). That section provides that carriers shall not pay freight forwarder compensation to other carriers or to carriers' agents, for forwarding services. It thus states: "An ocean common carrier by water shall not pay compensation as provided in this subsection to its agents or any other ocean common carrier or its agents."

No explanation or reason for this provision has been given, and we are not certain as to either its scope or purpose. We are very much concerned, however, that if enacted, without clarification, it would be given the effect of driving legitimate freight forwarders out of the ship's agency business, or vice versa, for no good reason, and to the benefit only of their competitors. Like other forwarders our companies cannot survive in the forwarding business without the right to collect compensation from carriers, which is far more important to forwarders generally than is the revenue received from shippers. Yet the provision in question if broadly interpreted, would prohibit bona fide forwarder/agents from receiving carrier compensation as long as they also engage in the ship's agency business. If so interpreted licensee/agents would be presented with an impossible dilemma—despite having acted for many years as both licensed fordwarders and agents, with the Commission's knowledge and approval. Either they must give up their agency business or be driven out of the forwarding business. In a time, and under a national administration pledged to deregulation, and a bill S. 1593 designed to deregulate the forwarder industry, this would be the ultimate in destructive regulation. We simply cannot believe the Committee really intends this result.

We, therefore, strongly request that Section 11(c)(3) be deleted from S. 1593 (or Section 605(d) from S. 125, if that should be the Committee bill), or clarified in a way to make it certain that it is not intended to apply to bona fide, independent forwarders—if licensed, as under the present law, or if bonded and otherwise qualified under a new law. Unless this is done Section 11(c)(3) of S. 1593 and Section 605(d) of S. 125 threaten the destruction of our livelihood without any reason stated or in fact.

Perhaps we are unduly alarmed. We must say that there is some question in our minds whether these provisions were actually intended to apply to licensed forwarder/agents under the present licensing law, or to agents who are not corporately affiliated with carriers.

If the section was intended to apply only to carriers and their subsidiaries or corporately affiliated companies, or to agents who do not also provide bona fide forwarding as a business, then it should be clarified. If it is so clarified, we ourselves have no problem with it, though we remain skeptical of the need or purpose of such a provision. If it is not so clarified then we must object to it in the strongest possible terms.

Moreover, it would benefit only our forwarder or agent competitors, not our customers. The provision in question is therefore highly anti-competitive. It is also discriminatory between forwarders who act as agents, and forwarders who also engage in other maritime related businesses such as customs house brokerage stevedoring, terminal operations, etc., but not in agency work.

The Committee should know that the provision in question would reverse decisions deliberately and thoughtfully made by Congress when the present licensing law was before the Congress in 1960 and 1961. It was at that time, at one point, proposed by the former Federal Maritime Board, that freight forwarder licenses and forwarder compensation be denied to carriers and their agents. Congress rejected these suggestions. The only limitation upon licenses was to shippers and shipper affiliates. In the intervening twenty years licensee/agents have operated as FMC licensed forwarders, as well as in the business of providing agency services to shipowners and operators, fully subject to FMC regulation, without a blemish upon their regulatory record. In this period there has been not a single complaint by any shipper or consignee or carrier to the FMC and not a single complaint issued by the FMC, directed to their status as both forwarders and ships' agents.

Not only are we unaware of any such complaints ourselves but we have searched the records of the Federal Maritime Commission under the Freedom of Information Act, and found none. Under these circumstances there should be a compelling reason to change the law. None has been stated in the record of these hearings or the House and Senate hearings in 1979 and 1980, and we believe there is none. Both shippers and carriers can simply take their business elsewhere if they do not wish to deal with a licensee/agent. The forces of the market place provide ample regulation of their own and have done so without significant problem for twenty years.

The Committee may fairly ask, as have we, where this provision came from in the first place and why. We have searched the recent legislative record for some explanation, with very little success. It was not contained in any of the three bills introduced by Senator Inouye in 1979, upon which Senate hearings were held in 1979. It first appeared in a draft of proposed legislation submitted by the Federal Maritime Commission to the House Merchant Marine and Fisheries Committee and Senate Commerce Committee in 1979. Precisely what the author of this provision intended in 1979 is unknown to us, as indeed is the identity of its author or purpose. This particular proposal was buried in a much longer and complicated bill covering many subjects and it was not explained by the Commission in its submittal to Congress, and no FMC witness testified with respect to it.

We have been advised by the Federal Maritime Commission's Acting Secretary that this provision was likewise not even mentioned in any of the three Commission meetings in 1979 in which the so-called draft proposed Shipping Act was discussed before transmitting it to the Congress (see attached letter). We must wonder whether the Commission itself then fully appreciated what it proposed.

While the same provision was later picked up in the Senate bill reported by this Committee last year, no witness testified with respect to it and it was largely ignored or overlooked, as we ourselves overlooked it at the time. The Senate Committee Report itself, last year, did not include it among the changes from existing law which it set forth at page 33 of S. Rept. No. 96-656, or otherwise mention it. The closest comment made in the Committee report was that "compensation may only be paid to a licensed forwarder"—which leads us to believe that it was not intended to apply to a licensee/agent in the first place, but was intended to apply only to unlicensed agents. This is one of the circumstances which leads us to believe that this Committee itself has not previously appreciated the impact of Section 11(c)(3), and that it would have wholly unintended consequences.

Though our companies do not also operate as non-vessel owning common carriers, Section 11(c)(3) would seem to us to present the same problem to those many forwarders who do act also as NVOCC's.

In his statement accompanying the introduction of S. 1593 on August 3, 1981, Chairman Gorton stated with respect to the freight forwarder provisions only that: "The bill eliminates licensing requirements, while retaining certain safeguards to see that freight forwarders are economically stable and will not act as conduits for illegal rebates."

In fact Section 11(c)(3), a totally new provision, would render this portion of the freight forwarding industry highly unstable economically and it cannot be justified as necessary to eliminate a "conduit for illegal rebates". No such abuses were attributed to forwarder/agents prior to the 1961 Act. No charge of any such abuses had been made in 20 years of regulation under the 1961 Act. In a recent Federal

Maritime Commission proceeding relating to the licensee/agent relationship no contention was made that it gives rise to or encourages illegal rebates. In five years of intensive Commission investigation of rebating and widespread attendant publicity there has been no indication that any licensee/agent has been involved in rebating—and, of course, if it were, the Commission has ample powers under existing law to investigate and if necessary even to suspend or revoke the licenses of offenders. The fact is that an independent forwarder engaging in forwarding and ship's agency work as a business is in no different position in this regard than any other forwarder or agent.

It should be noted also that the concern for "dummy forwarders" provides no justification for Section 11(c)(3). That is a concern and a term directed towards possible abuses arising from shipper/forwarder relationships, not carrier/forwarder or agent forwarder relationships. The term "independent" in "independent ocean freight forwarder" refers to independence of shipper from forwarders, not carriers or ships' agents from forwarders.

"We note that Federal Maritime Commission Chairman Alan Green stated in his testimony to this Committee on September 21, 1981, that the present law "has proven successful in correcting" the previous widespread abuses in the freight forwarder industry and that it has done so without imposing an "unnecessary burden on the forwarding industry." We agree and add that that fact provides additional demonstration that there is no abuse requiring or justifying Section 11(c)(3) which would indeed be an unnecessary and destructive burden on our segment of the forwarding industry.

"We point out also that the forwarder industry representative testifying in behalf of the National Customs Brokers & Forwarders Association of America, Inc., before the House Merchant Marine Subcommittee in September, 1979, likewise expressed complete satisfaction with the existing legislation and Commission regulation of the forwarder industry stating: "We do not understand why any change in the current forwarding legislation is being proposed. After 4 years of study, this committee in 1961 produced a statute that has worked remarkably well. As we have indicated, licensing has resulted in professionalism in our industry, and the provisions for brokerage are fair and reasonable to the forwarder and carrier. Why then is any change necessary? We state, as emphatically as we can, that we have a good law on the books and that it should remain just as it is, at least for the forwarders." [1]

In 1980 in a rulemaking proceeding the FMC invited public comments as to possible "conflicts of interest" of persons who act as both licensed forwarders and carriers or agents. In response in that proceeding likewise, there were theoretical arguments as to possible conflicts, but there was not a single documented instance or even allegation of any specific instance of any such problem, as distinct from generalities and theoretical and speculative arguments of any actual conflicts of interest. In that proceeding the Commission found in April, 1981 that allegations of "conflict of interest" had not been substantiated, and it rejected a proposal to deny licenses to carriers and carrier's agents.

Congress rejected the "conflicts of interest" argument in 1961. In the absence of any actual demonstrated instance of an actual problem in the ensuing twenty years, and in the absence of even a complaint from any of our customers, we submit that this is a spurious argument for purely anticompetitive purposes. Equally theoretical and speculative arguments can be made as to many other businesses or combinations of businesses. We don't believe this Committee sits to drive people out of business on the basis of such arguments.

We have also heard an argument [2] that a forwarder/agent receives double compensation on shipments as to which it acts in both capacities and that there should be a rule to eliminate that possibility, and therefore, presumably, protect the steamship lines. This, too, is a spurious argument, as we believe we have established in the attachment to this statement.

In fact the steamship lines have enough clout to look after their own interests and do and will. The "double compensation" argument also demonstrates a total lack of understanding of what a forwarder does and what a ship's agent does. A forwarder and ship's agent have different functions, and are not paid twice for the same thing. If a carrier who completes a shipment with a forwarder also operates in a particular port with an agent rather than with his own staff, he will still have to pay the agent as well as the forwarder. *We do not see what difference there is to* the carrier or to the public interest, whether the carrier's payments for forwarding and agency services go to one person or two. The fact is that the only interest that would be served by Section 11(c)(3) is that of our competitors in the forwarding or agency business, who might pick up the business that would be taken away from us.

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[1] Testimony of William R. Casey, Association President, in Hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, H.R. 4769, 96th Cong., 1st Sess. (1979), p. 151. Association counsel Gerald H. Ullman, Esquire, similarly commented, in the same Hearings, p. 154: "The forwarding industry has really been operating since 1961 in what I could say as unblemished procedures."

[2] In FMC Docket 80-13, a rulemaking proceeding involving freight forwarders, a similar provision for denying compensation to carriers or carriers' agents was made, without explanation. It is now under reconsideration by the Commission.

Section 11(c)(3), we respectfully submit, must be considered in the perspective of the fact that freight forwarders are the only segment of the maritime industry requiring an FMC license. Anyone familiar with the 1961 licensing law knows that it was passed in part for the protection of the forwarder industry to ensure their right to collect compensation from carriers. One segment of the industry should not now be permitted to use that federal regulation, originally a shield for their protection, as a sword now to strike at another segment of the industry for selfish competitive purposes.

Many forwarders in the smaller ports went into that business in the first place in combination with the agency business because there were no other forwarders available in those ports. Over the years they have made substantial investments of time and money to develop this forwarding business. All other considerations aside, it would be a gross injustice to destroy their businesses today after they have rendered a genuine service to their shipper clients for so many years.

Upon the broader subject of whether there should be substantial deregulation of the forwarder industry as proposed in S. 1593, we believe the important considerations are: (1) to avoid revival of abuses relating to the creation by shippers of so-called dummy forwarders as a means of obtaining rebates; and (2) preservation of competition, including free entry by qualified forwarders, and avoidance of artificial retrictions on competition. As to whether this can better be accomplished by licensing as at present or by increased bonding requirements or other measures, we are content to rely upon the judgment of Congress. Of one thing we are quite certain, however: if the alternative is deregulation or destructive regulation, as the proposed prohibition upon the payment of compensation to forwarders who are also agents in Section 11(c)(3) of S. 1593, and as was proposed by competitors in the pending FMC rulemaking proceeding, deregulation is far preferable.

In conclusion, historically Congress' concern has been with the relationship of shippers and forwarders, and it has rejected efforts to deny licenses and compensation to carriers and agents who also act as forwarders. The thrust of the recent amendment to Section 44 of the Shipping Act, in the Budget Act, was to liberalize even the restrictions upon shipper/forwarder relationships. A restriction now on forwarder/agent relationships would be inconsistent in philosophy with that recent amendment as well as a reversal of Congress' decision in 1961 and 20 years of problem-free operation, so far as licensee/agents are concerned.

We, therefore, respectfully request that Section 11(c)(3) be deleted from S. 1593. If the Committee wishes to preserve its substance, as to carrier subsidiaries, as distinct from persons not corporately affiliated with carriers, who engage in both forwarding and ship's agency as a bona fide business, we ask alternatively that Section 11(c)(3) of S. 1593 be amended by the addition of the following proviso: "Provided that this subsection shall not apply as to agents who are otherwise qualified to act as ocean freight forwarders under this section."

FEDERAL MARITIME COMMISSION,
Washington, D.C., June 11, 1981.

Mr. J. ALTON BOYER,
Kominer, Fort, Schlefer & Boyer,
Washington, D.C.

DEAR MR. BOYER: Reference is made to your May 23, 1981, Freedom of Information Act request (received May 28, 1981) regarding a provision in the Revised Shipping Act prohibiting compensation to agents or carriers. Transmitted are all documents within the description of item 1 of your request except for a copy of a Senate staff Working Draft dated March 27, 1980, designted "Confidential," which is withheld pursuant to 5 U.S.C. 552(b)(5).

With respect to items 2 and 3, the Freight Forwarders section of the Revised Shipping Act was discussed at Commission meetings of June 29, 1979 and July 9, 1979. However, the minutes and transcripts of these meetings show no reference to the specific provision referenced in your request. The particular provision was adopted by the Commission as part of the entire proposal on July 13, 1979, again without any discussion of this specific provision. Copies of minutes and pertinent pages of transcript are provided.

My determination to without certain material may be appealed to the Chairman, Federal Maritime Commission, pursuant to 46 C.F.R. 503.34.

The charges for supplying this information are $37.30. Please include the invoice number with your payment.

Very truly yours,

JOSEPH C. POLKING,
Acting Secretary.

Enclosures.

ATTACHMENT

MISCONCEPTION AS TO THE NATURE OF THE SHIPS' AGENCY BUSINESS, AN AGENT'S RESPONSIBILITIES, AND REMUNERATION

A forwarder/agent does not receive "double" compensation, even when he acts as a forwarder on shipments which are routed via a ship as to which he also performs agency functions. When so acting he is performing two functions and is clearly entitled to compensation for both.

In this context the term "agent" can mean a number of things, even for vessels in liner trades. There are at least five types of ship "agents": Owner's Protective "Agent"; Husbanding "Agent"; Port "Agent"; Sales "Agent"; General "Agent".

1. *Owner's Protective "Agent"*—The "agent" in this instance is appointed by the owner of the ship to look after its interests, which may or may not coincide with the interests of the charterer (the liner operator). Depending on the terms of the charter (bareboat, time, etc.) the duties of the protective "agent" will vary considerably. Appointments as protective "agent" are usually made on an ad hoc basis and the fees for this service usually are in a stated flat amount.

2. *Husbanding "Agent"*—Here the "agent" is the servant of the vessel and its master and owners or charters for husbanding purposes and that alone. In this capacity, the "agent" attends to all needs of the vessel while in port, which include but are not limited to such things as arranging for, obtaining, employing, handling, supplying, etc.:

(a) Pilots.
(b) Tug boats.
(c) Line handlers.
(d) Line boat.
(e) Ship's stores.
(f) Gangway watchmen.
(g) Marshalling barges.
(h) Repairs of all sorts.
(i) Crew replacements and repatriations.
(j) Obtaining divers, bilge cleaners, etc.
(k) Laundry services.
(l) Bunkers.
(m) Doctors, dentists, ambulance and hospital services.
(n) Berths and shifting if required.
(o) Crew mail.
(p) Customs clearance as well as clearance from Quarantine, Immigration and Naturalization.
(q) Telephone and telex service.
(r) Transportation for crew and equipment.
(s) Surveys.
(t) Stevedoring.
(u) Cash for master.
(v) Proper notification to U.S. Coast Guard.

All of these items are generally handled by the "agent's" boarding representatives, sometimes referred to as the "agency/operations department". Fees likewise are usually in a flat amount.

3. *Port "Agent"*—In addition to husbanding duties, port "agent" for liner services have other departments which may perform the following additional services:

Import freight department

(a) Sends arrival notices to importers.
(b) Collects freight monies due from consignees.
(c) Collects wharfage due from consignees.
(d) Arranges formalities for transshipped cargo.
(e) Prepares hatch lists of cargo to be discharged.
(f) Issues carrier's release.
(g) Collects original bills-of-lading.
(h) Quotes freight rates and maintains tariffs.

Export freight department

(a) Prepares hatch lists of cargo to be loaded.

(b) Prepares manifests including dangerous or hazardous cargo manifests and forwards to overseas agents in a timely manner.

(c) Makes certain all cargoes booked are in port and at point of rest.

(d) Issues any special instructions to stevedores.

(e) Issues cargo booking and confirmations to freight forwarders and/or shippers.

(f) Receives cargo for vessel from freight forwarders.

(g) Freights and signs bills-of-lading on behalf of master for forwarder and/or shipper.

(h) Collects ocean freight and wharfage.

(i) Quotes freight rates and maintains tariffs.

Container departments

(a) Supplies chassis and/or flat bed for containers.

(b) Matches and obtains containers and chassis for bookings.

(c) Arranges for stripping and stuffing containers.

(d) Arranges interchanges between carriers' terminal and the vessel.

(e) Arranges the leasing or termination of leases on behalf of carrier.

(f) Determines and collects demurrage from carrier or shipper or consignee as required.

(g) Arranges inspections and repairs of containers.

(h) Maintains and reports equipment inventories.

All "agents", of course, have an accounting department in which all ships' disbursements accounts are collected, checked and billed to the owner for payment to various vendors.

The remuneration for a port "agent" as described above varies considerably. the "agent" does not set his fees for services and present them to the world of shipowners and operators; rather the shipowners and operators set the fees, occasionally subject to negotiation with prospective "agents". Port agency fees may be:

(1) A flat fee, depending more on what the principal is willing to pay than on services rendered.

(2) A fee based on the number of days a ship is in port. For example, a flat fee for the first five days plus a small additional fee for each additional day.

(3) A fee based on the number of tons loaded or discharged.

(4) A percent of the manifest, usually subject to a minimum and excluding all surcharges. These percentages vary, none remotely approaching 5 percent and do not have anything to do with who books the cargo.

4. *Sales "Agent"*—Some liner companies handle all sales matters themselves, while others assign sales responsibility to their port "agent," and still others employ a separate sales "agent." A sales "agent" may or may not be located in the port area, and if in the port area he may or may not be the same as the husbanding or port "agent". He may or may not have territorial limitation on his sales responsibilities. The fees for booking commissions may vary generally running 1¼ to 2½ percent. We know of no case of a port "agent" who receives a booking commission as much as 5 percent.

The booking commission, while measured by successful solicitations and booking, is in fact remuneration for the total sales and representational activity of the sales agent, both that which results in a current booking and that which is not immediately (or perhaps ever) successful. The carrier paying a booking commission is paying for the total sales activity of its sales agent, relieving the carrier of the necessity and expense of maintaining its own local sales office and force. That the payment is limited to cargo actually booked goes to the measure of the payment, not to the consideration for which paid.

It is believed that generally forwarder compensation far exceeds agency booking commissions in importance to a licensee/agent.

5. *General "Agent"*—A general "agent" is one who handles all matters for an owner in a particular range of ports (Atlantic Coast, Gulf Coast, Gulf and south Atlantic, North Atantic or the entire country). He manages the owner's or operator's affairs including the scheduling of the ships, the selection of port "agents", area sales "agents', stevedores, etc. The general agent may also have to pay all sub-"agents", whether sales, husbanding or port, out of his fees. We do not know what a general "agent" customarily receives in the way of fees. It may be as much as the 5 percent we have heard incorrectly described as the normal agency fee. We know of no general "agent" who is also a licensed forwarder.

It is evident that in any event a forwarder/agent does not perform duplicate functions or get "paid twice" for the same functions.

If a forwarder/agent employed by a particular carrier were forced to give up his forwarder or his agency business, because of a rule forbidding payment of forwarder compensation to a ship's agent, the carrier would still be required to pay fowarder compensation and agency fees. That it would then be divided between two persons, rather than all to one, for the same services, hardly advances the carrier's interest or the public interest. The only result would be destructive of the forwarder/agent's interest, elimination of him as a competitive factor in one business or the other, and an arbitrary shifting of that business to a competitor.

Senator GORTON. Mr. Leslie Stuart of Southern Steamship Agency.

STATEMENT OF LESLIE H. STUART, JR., VICE PRESIDENT, SOUTHERN STEAMSHIP AGENCY, INC., ACCOMPANIED BY THOMAS MILLS, COUNSEL

Mr. STUART. Mr. Chairman, members of the committee and professional staff, I am Leslie H. Stuart, Jr., vice president of Southern Steamship Agency, Inc. I am accompanied by Mr. Thomas Mills, counsel. My company joins wholeheartedly in the written statement submitted by Mr. Ruffin in behalf of independent ocean freight forwarders in South Atlantic and Gulf ports.

Incidentally, to avoid possible confusion in anyone's mind, I note that the word "Southern" appears in two of the names of the companies in Mr. Ruffin's group as well as in my company's name. This is a coincidence. There is no relationship between these companies.

Southern Steamship Agency, Inc., has for a number of years engaged in freight forwarding activities in small ports in the South Atlantic-east gulf range. It also acts, and has for many years, as a ship's agent in those ports.

Our company was licensed as an independent ocean freight forwarder until July 1, 1981. At that time, we voluntarily surrendered our license in compliance with section 1 of the Shipping Act of 1916 when Southern Steamship Agency's parent company, Ryan-Walsh Stevedoring Co., Inc. was purchased by Dravo Corp., a company with shipper interests. We reapplied for a license as an independent ocean freight forwarder on September 8, 1981, after the definition of "independent ocean freight forwarder" was amended by the so-called transway amendment to Public Law 97-35. We expect the license to be granted within a matter of days.

If section 11(c)(3) of S. 1593 is enacted, it will once again drive us out of the forwarding business. We fully support all that was said by Mr. Ruffin's group and respectfully ask the committee to delete section 11(c)(3).

Senator GORTON. Obviously my comments to Mr. Ruffin apply equally to you. If we do have questions as we look into this further, we will submit them to you in writing, but we do think you make a good case.

Mr. Raymond de Member.

STATEMENT OF RAYMOND P. de MEMBER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, INTERNATIONAL ASSOCIATION OF NONVESSEL-OPERATING COMMON CARRIERS

Mr. DE MEMBER. Chairman Gorton, good morning. My name is Raymond de Member. I'm the executive vice president and general counsel of the International Association of NVOCC's.

We've submitted a prepared statement, and I won't read it, even though it is rather brief.

Senator GORTON. We will include it in the record in full.

Mr. DE MEMBER. I would like to emphasize and call attention to the fact that NVO's like VO's are required to file tariffs with the FMC and are fully regulated under the Shipping Act, as VO's are. And at the present time NVO's as VO's do, have rights to file agreements under section 15, the current section 15 of the Shipping Act and also have the authority to file intermodal rates.

As I pointed out in the statement, in the definitions section as well as in section 4, authorized activities, the combination seems to us to effectively preclude NVO's from filing agreements, and also effectively precludes NVO's from filing intermodal rates, authority which NVO's now have. I have made suggestions for limited changes in the definitions section—which wou3d take care of this, I think, unintended result.

As I pointed out in the statement, in section 3, the definitions section, a distinction is made between NVO's and VO's, a distinction that has not been made by the FMC or the courts. In section 3, subsection (5), it defines a common carrier engaging in transportation by water as including both NVO's and VO's, but paragraph 12 defines an ocean common carrier as including only VO's, and paragraph 13, other persons subject to the act, does not include NVO's.

The bill provides in section 4 under authorized activities, that ocean common carriers and other persons subject to the act, which again does not appear to include NVO's in either category, have authority and the right to file agreements on the various matters described in that section.

And in the intermodal section, the present language provides that ocean common carriers which is limited to VO's, or other persons subject to the act, which again does not include NVO's, may agree with each other or any combination of air carriers, motor carriers or other common carriers by water, to establish through transportation routes for the movement of cargo, and to establish through intermodal rates. That language taken in connection with section 3, paragraph 21, defining through intermodal rate as a single amount charged by an ocean common carrier in connection with through transportation and paragraph 22 defining through transportation as transportation by two or more carriers, at least one of which is an ocean common carrier, effectively precludes NVO's intermodal service.

As I stated, I do not think that this committee or the Congress really intend that result. I would be perfectly willing and am anxious to work with the staff of the committee in perfecting that section of the act, insofar as NVO's are concerned.

I think that really concludes my remarks. I would like to ask the chairman if it is permissible to file a supplementary statement. I did not address in the statement anything with respect to S. 125, and I would like to do that.

Senator GORTON. Yes, it is perfectly appropriate to do so, and we would welcome it.

Why are NVOCC's so much like vessel operators on international trade routes that they should also be able to enter into agreements and act collectively?

Mr. DE MEMBER. NVO's don't file that many agreements, Chairman Gorton. They obviously aren't interested in allocating ports and that kind of thing, but they do have coloading and cooperative working agreements, and these have been permitted under the present act and been approved by the Federal Maritime Commission. They would be in a limited area. NVO's haven't resorted to filing agreements in the vast areas that VO's do. There hasn't been a need to, a commercial need or interest, but we would not want to be precluded from filing agreements. It just seems anomalous for the committee—the Congress, to authorize agreements for all the entities described in "Other Persons" in the act, and for VO's in a separate section and exclude only NVO's.

Since the committee included in "Other Persons Subject to the Act," the terminal operators, those providing dock and wharfage services, warehouse services, forwarders, it seems irrational to exclude one entity only within the ocean transportation industry, the NVO's.

Senator GORTON. Let's pursue this. Would you tell me why it is that freight forwarders, consolidators, vessel operating carriers, either can't or don't or won't do all that NVOCC's do and do it just as efficiently? Where do you fit into this category?

Mr. DE MEMBER. The freight forwarder and other entities, consolidators, who may do some part of the NVO services, do not issue bills of lading. The NVO does issue a bill of lading. The NVO is much more like the part 4 freight forwarder under the Interstate Commerce Act. He is a carrier and responsible for the shipment, is liable to the shipper for the shipment of the goods as a carrier, whereas all the other entities you describe are not, they do not fit in that category. When these other entities, including forwarders, do perform all these services, they then become NVO's, that is, carriers.

Senator GORTON. Should they be licensed or bonded?

Mr. DE MEMBER. We have presented legislation and supported legislation in the past supporting licensing for the same reasons that have been put forward on behalf of freight forwarder licensing. We did not submit language to that effect this year, I think in great part because of a feeling that the current deregulation philosophy or attitude would probably make it not worthwhile, we didn't expect to succeed with that.

Senator GORTON. In any event, do you feel the same rationale is applicable?

Mr. DE MEMBER. Yes, we do.

Senator GORTON. Thank you very much. Your testimony also is very helpful to us. It will be considered, and we would be happy to have a supplement to your statement in the record.

Mr. DE MEMBER. Thank you, Chairman Gorton.

[The statement follows:]

STATEMENT OF RAYMOND P. DE MEMBER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL OF THE INTERNATIONAL ASSOCIATION OF NVOCC'S

My name is Raymond P. de Member. I am the Executive Vice President of General Counsel of the International Association of NVOCCs. Members of the Association are non-vessel operating common carriers (NVOCCs or NVOs) recognized by Congress, the Courts and the Federal Maritime Commission and other federal agencies.

We appreciate this opportunity to submit the views of NVOCCs on S. 1593.

The NVOCC operates and provides transportation in the waterborne foreign and domestic commerce of the United States, and files tariffs covering its transportation rates with the Federal Maritime Commission the same as any other common carrier by water. NVOs service the numerous shippers who do not ship in full container lots, as well as full container shippers at interior points who require a complete door-to-door service, or special inland transportation arrangements. The NVOCC, as a common carrier by water, performs an essential and valuable service to the public by assembling and consolidating less-than-container load (LCL) shipments into container loads, then transferring the loaded containers to the pier for shipment overseas. By thus consolidation LCL shipments for the small shipper, or the less-than container load shipper; by servicing the full container shippers at interior points who need a complete door-to-door service, or special inland transportation arrangements; by preparing all of the documentation including waybills, bills of lading, manifests; by routing and tracing shipments, performing transfer services, the NVO not only reduces loss and damage, pilferage, congestion and delay at the piers, but the NVO in effect becomes the export marketing and traffic management arm of the less-than-container load shipper and distribution arm of the full container shippers. The NVO thereby truly makes it possible for many shippers, who, but for the NVO, would not be able to, to participate in the export trade of the United States on a realistic cost and service competition basis.

S. 1593, in Section 3, the Definition section, makes distinctions between NVOs and VOs (vessel operating carriers) that have not been made by the Federal Maritime Commission or the Courts. The distinctions made in the proposed legislation and the resulting limitations on NVOs services will effectively eliminate NVOs from servicing shippers in ocean commerce.

Section 3, paragraph (5) defines a "common carrier" engaging in transportation by water as including both NVOs and VOs. However paragraph (12) defines an "ocean common carrier" as including only VOs. Paragraph (13) defines "other persons subject to this Act" without including NVOs. S. 1593 also defines "Conference" in paragraph (6) as meaning an association of "ocean common carriers", thus excluding NVOs.

The bill then provides in Section 4 Authorized Activities (a) Conference Activities—that Ocean common carriers or other person subject to this Act may agree to discuss, fix, regulate rates as well as participate in other agreements and cooperative working arrangements.

NVOs have, now, under existing law, a right to form agreements subject to the approval provisions of Section 15 of the 1916 Shipping Act.

By this bill you eliminate this right while granting the right to VOs and other persons subject to this Act such as freight forwarders, warehouse operators, businesses furnishing wharfage, dock or other terminal facilities. We believe this may have been unintended, since there is no rational reason to permit all persons in ocean transportation subject to this Act to have the right to form agreements with others subject to the Act, excepting NVOs. We suggest that "common carrier" in paragraph (5) of Section 3 be amended to "ocean common carrier" and that the separate definition in paragraph (12) of Section 3 be deleted in its entirety.

Further, in paragraph (b) of Section 4 relating to Intermodal Activities the present language provides that: "ocean common carriers or other persons subject to this Act may agree with each other or with any combination of air carriers, rail carriers, motor carriers, or other common carriers by water to (1) establish through transportation routes for the movement of cargo; and (2) establish through intermodal rates, or concur in tariffs."

This language, taken in conjunction with Section 3 paragraph (21) defining "through intermodal rate" as the single amount charged by an ocean common carrier in connection with through transportation" and paragraph (22) defining "through transportation" as "transportation by two or more carriers at least one of which is an ocean common carrier, . . ." eliminates NVO's intermodal service.

The language of these sections would not permit NVOs to file "intermodal rates" or provide "through transportation" as common carriers by water, a right they now have under existing law. The language of the proposed legislation would eliminate NVOs from competing with VOs in offering intermodal service to the public and to the shipping customers of NVOs, since only VOs would be granted the right and privilege of making arrangements with air, rail and motor carriers.

Thus, the failure to include NVOs within the definition of ocean common carriers by water will effectively preclude NVOs from serving as intermodal carriers for the small shippers and LCL shippers of the United States. Small shippers and LCL shippers throughout the United States will be effectively precluded from the cost and service advantages of intermodal movement of cargo and these advantages will effectively be restricted to the large, full container load shippers who are customers of VOs. The NVOs are the only effective vehicle for intermodal shipments for small shippers and LCL shippers. Exclusion of NVOs from intermodal transportation and the consequent exclusion of small shippers and LCL shippers from the advantages of intermodal transportation is not only an unwarranted, unjust discrimination against such small shippers, LCL shippers and NVOs, but it is also harmful to the public interest because of the resulting reduction in United States export trade and resulting adverse effect on the United States balance of payments.

The change we recommended above, that is, the deletion of paragraph (12) in Section 3 and the addition of the word "ocean" before common carrier in paragraph (5) of Section 3, would resolve all of the problems we have cited here. We cannot believe that it was or would be the intention of this Committee and Congress to eliminate the valuable services of NVOs to the shipping public and thereby eliminate the competition of NVOs in ocean transportation. We are convinced this Committee and the Congress are anxious to maintain and increase competition in the marketplace and to maintain and provide for an increase in the valuable services rendered by NVOs to the shipping public, thereby increasing United States exports and improving our balance of payments in foreign trade.

With the advances made in recent times in authorizing intermodal services, for VOs and NVOs, it would indeed be an anomaly and a perversion for this Committee to take a huge backward step by removing and prohibiting the intermodal and agreements rights NVOs presently have under existing law. We strongly urge this Committee to adopt the changes in the language in the bill that we have suggested, and thereby provide for the continuation and expansion of the valuable services of NVOs, especially to the less-than-containerload shipper.

We thank the Chairman and the members of this Committee for this opportunity to present our views on S. 1593.

[The following information was subsequently received for the record:]

International Association of NVOCCS,
Washington, D.C., November 28, 1981.

Hon. Daniel K. Inouye,
Subcommittee on Merchant Marine,
Committee on Commerce, Science and Transportation, Washington, D.C.

Dear Senator Inouye: I am submitting here answers to several questions you requested we answer concerning various aspects of proposed maritime legislation and shipping regulation by the Federal Maritime Commission.

Question 1. Should the activities of non-vessel operating common carriers be exempt from the antitrust laws; or should they be treated differently than ocean common carriers?

Answer. Non-vessel operating common carriers (NVOCCs) should be treated no differently from any other common carrier in ocean shipping. Thus NVOCCs should have the same anti-trust exemption as do other carriers. There have been few agreements involving NVOCCs. However the need for such agreements in an ever changing maritime world is gaining in importance. One area—the prevention of malpractices is an area which is ripe for providing for self policing of the NVOCC industry. Agreements amongst NVOCCs, like those involving vessel operators, should be accorded the same antitrust exemption.

The opportunity to continue agreements between vessel operators and NVOs is also necessary. One example of such an existing agreement is Agreement 10412, permitting Farrell Lines to charter space to an Ivory Coast carrier which has no vessels. Space chartering, and cooperative working arrangements will permit innovative new services to be developed and these should be encouraged by continuing the antitrust immunity granted through the agreement process.

Question 2. If the requirement to file tariffs were removed, what would be some of the possible adverse consequences in the U.S. liner trades:

Answer. If the requirement to file tariffs were removed—all effective regulation would likewise be removed. The ability of shippers to compete fairly with each other would be impaired. Discrimination and preference would go on unchecked and uncheckable. In the absence of tariffs "malpractices" would become "practices." Controlled carrier activities could not be monitored and corrected. In short, we believe that U.S. flag services would fall prey to foreign concerns and nations who do not have the best interests of the United States and its citizens in mind. Tariffs are the single instrument allowing some order and assurance of fair dealing in shipping markets. It is an important tool of carriers, shippers and our government. Without the tariff instrument our international trade and our domestic industry in foreign commerce will certainly suffer.

Question 3. Should independent ocean freight forwarders be licensed by the FMC?

Answer. We believe that independent ocean freight forwarders should be subjected to licensing requirements to ensure that they are competent to provide a service to shippers. We also believe that they should be truly independent of both shipper and carrier interests.

Question 4. U.S. carriers, U.S. ports in the northeast, and on-shore maritime labor are suffering because shipments of cargo from the U.S. which should naturally be exported from U.S. ports (and vice versa for imports) are being diverted to Canadian ports. Under present law, the water carrier does not have to file a tariff with the FMC with respect to carriage of these cargoes. Among other things, this means a shipper can accept rebates, which would be illegal in the U.S., from an ocean carrier who picks up or discharges such cargo at a Canadian port.

Should a carrier be required to file a tariff with the FMC even if the cargo was loaded or off-loaded at a Canadian port, as long as its origin or destination is the U.S.?

Answer. There is some argument to be made that tariffs should be filed covering all cargo moving between U.S. points and foreign points regardless of the port of exit or entry.

It has been claimed that carriers serving the United States via Canadian ports are skimming the higher rated cargoes through their services and thus depriving carriers serving U.S. ports of the most profitable shipments. Also, carriers serving the U.S. through Canada are alleged to be "dumping" their services on the U.S. market at rates materially below rates charged Canadian shippers. Serious consideration must be given to correcting these activities and results. Whether requiring that tariffs be filed with the FMC for such movements can as a practical matter be accomplished or enforced seems questionable at this time. The problem may require at least a minimum of government to government negotiation for an acceptable solution for both countries.

Question 5. If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?

Answer. Rate decreases are presently allowed to become effective upon publication. Certainly the failure to provide some advance notice may prefer certain shippers, i.e. the shipper for whom the rate has been established. The danger of discrimination from continuing this provision is miniscule compared to the dangers from discrimination if those advocates of no tariff filing requirement at all succeed.

This association takes no position on the time to be required for the filing of rate reductions but we do feel strongly that they must continue to be filed.

Question 6. Should any legislation the committee recommends include without substantive change the provisions of the Maritime Labor Agreement Act which was enacted last year?

Answer. The Maritime Labor Agreement Act of 1980 (MLAA) was enacted primarily to remove the requirement that prior FMC approval was necessary for collective bargaining agreements involving parties subject to the Shipping Act of 1916. The original version of the proposed legislation as passed by the House of Representatives in H.R. 6613, in its entirety, was substituted for by a Senate Merchant Marine Subcommittee version, which with perfecting amendments, became the MLAA of 1980. This was done because the overwhelming majority of those opposing the House passed version felt it (H.R. 6613) went beyond what was necessary to assure free and unfettered collective bargaining and the House version had stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo and localities and to prevent abuses made possible by concerted activity of ocean carriers and others. The Senate substitute was adopted and became law precisely because it did preserve FMC jurisdiction ensuring equal treatment of shippers, cargo and localities and jurisdiction to prevent abuses made possible by concerted activity of ocean carriers and others.

One of the examples of unequal and discriminatory treatments of shippers cited in the hearing was the so-called "50 mile rules on containers" collectively bargained between the ocean carriers and the ILA. The FMC held these rules to be unlawful under Sections 16 and 18 and others of the Shipping Act since they were clearly discriminatory and treated similarly situated shippers unequally and prejudicially in the providing and handling of containers for shippers (see pp. 87–93 Senate Report No. 96–107, June 4, 1980).

This case clearly was one of the factors impelling the Committee and Congress to adopt the language of new Section 45 of the Shipping Act preserving FMC jurisdiction over such concerted discriminatory activities of carriers, whether "arising out of or otherwise related to a maritime labor agreement." This was the rationale for the following language in Section 45: ". . . nothing in this section shall be construed as providing an exemption from the provisions of this Act [i.e. Shipping Act, 1916] or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations or *practices* of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations or *practices* arise out of or are otherwise related to a maritime labor agreement." (46 U.S.C. 842). (Emphasis added)

Nothing could be clearer than this explicit language, as well as from the hearings and the Committee Report that this language was adopted precisely to preserve FMC jurisdiction over such concerted discriminatory treatment of NVOCCs as shippers as takes place under the FMC declared unlawful 50 mile rules. Yet the NVOCCs are repeatedly facing arguments in other tribunals by the ocean carriers, carrier associations and the ILA that the MLAA of 1980 exempted the unlawful and discriminatory 50 mile container rules from FMC jurisdiction.

I am attaching to this letter pages 25-34 from a recent brief (May 26, 1981) filed at the FMC by the New York Shipping Association, the Council of North Atlantic Shipping Associations and the ILA, in FMC Docket 81-11, claiming that the Congress in MLAA, 1980 exempted the unlawful 50 mile container rules from FMC jurisdiction. (see attached p. 26 where it is claimed: "This legislative exemption is a clear and firm expression of Congressional intent to exempt labor accords, such as the Rules on Containers, from unsettling regulation under federal shipping laws").

Neither your Committee nor the Senate should permit this attempted perversion of the legislative process to succeed. This attempt is particularly obnoxious when the Senate Permanent Subcommittee on Investigations earlier this year heard clear testimony that the 50 mile container rules serve as a vehicle for pay-offs, bribery and corruption in some ports. (See attached news article on the Committee's investigation and see February 18, 1981 Staff Investigation Report of Twin Terminals.)

Implementation of the 50 mile container rules are unlawful, discriminatory concerted activities of ocean carriers and others, whether the rules are contained in labor agreements or not. The Senate should make clear, explicitly, that it did not intend to exempt from the MLAA, 1980, such discriminatory practices as the 50 mile container rules.

Indeed serious consideration should be given to outlawing the 50 mile container rules explicitly by legislation. H.R. 2042, copy attached, introduced in the House of Representatives, would accomplish this purpose and we urge the Senate Subcommittee on Merchant Marine to make this a part of any maritime reform legislation.

Shippers of small shipments, i.e., less-than-containerload (LCL) shipments, depend on the services of NVOCCs who consolidate these shipments into containerloads, in order to receive the advantages of containerload lower costs and advantages of intermodal expeditious transportation service in order to remain competitive in our export trade. Adoption of the language of H.R. 2042 would not only preserve the services of a competitive NVOCC industry servicing these shippers of LCL shipments, but explicitly outlawing the 50 mile container rules will prevent the rules from becoming a vehicle for payoffs and corruption in other ports as they have in the port of Miami.

Question 7. Should the requirement in present law requiring non-vessel operating common carriers to file tariffs be retained in any legislation the committee recommends?

Answer. Non-vessel operating common carriers should be required to file tariffs for the protection of the shipping public and to ensure that regulation can be meaningful. Tariffs are the backbone of any reasonable regulatory scheme. Tariffs are the real safeguard for the public against unlawful discrimination. Tariffs ensure that rates are offered to all equally—since all can have knowledge of them. Tariffs ensure that the rate filed is the rate which is assessed. All malpractices can be discovered through the application of what the tariff contains, to the actual practices of the carrier as reflected in his records. The public interest demands that tariffs be filed by NVOs and by all common carriers operating in our commerce.

Question 8. S. 1593 provides that an agreement could be disapproved if it could be shown by opponents to be (I) "unjustly discriminatory", or (II) "detrimental to the commerce of the United States."

Do you believe these two standards are sufficiently clear and precise so that parties will readily know their rights under the law; and that the FMC will be able to apply the standards easily and expeditiously?

Answer. Initially we must state our disagreement that the burden of proof should be shifted to opponents of agreements in all agreement cases. After all, parties to agreements are asking that they be exempted from the antitrust laws of the United States. Such parties should be required not only to justify the need for such an exemption, and should carry the burden of showing that need, but should also show specifically the particular activities to be engaged in under the agreement and the justification for these concrete activities. Parties to such agreements should not be granted a carte blanche license to engage in a myriad of anticompetitive activities free from the antitrust laws. Such agreements must be justified in terms of the specific activities and should be limited to those activities which have been justified.

The burden should not initially, be on opponents of such an exemption from the antitrust laws.

We have some concern that the standards for FMC disapproval of agreements as now provided in S. 1593 may not be comprehensive enough because of the thoughts we have expressed above. However, the Committee should delete paragraph (c) of Section 6 of the bill, so as not to shift the burden of proof to opponents.

Question 9. Under present law, the FMC may approve a Conference Agreement for economic cooperation (including pooling) among its members even if the effect of that agreement is to prevent competition from "outsiders" in the trade. If the FMC approves such an agreement, the parties, of course, receive antitrust immunity.

Do you believe whatever legislation we recommend should give the FMC this authority, and continue the antitrust exemption?

Answer. Any authority granting antitrust immunity for agreements which effectively prevent competition from outsiders, should be circumscribed with definitive standards of approval and should require that any such agreement contain explicit safeguards. The burden of showing transportation needs and public interest justification for such effective prevention of competition from "outsiders" should be a heavy burden on the proponents of such agreements. Such agreements are so contrary to the history of free and open competition in the United States, that they should be approved only after meeting stringent standards and after the most careful consideration of a showing of a very clear and significant justification.

Question 10. Do you believe the $ level in S. 1593 for bonding for freight forwarders and non-vessel operating common carriers is too high; too low?

Answer. We believe the level is probably about right. There is no level high enough to protect absolutely the shipping public from unscrupulous operators. The sum of monies and the value of cargoes handled by freight forwarders and by NVOCCs is substantially more than the $150,000 bond proposed in S. 1593. However, the $150,000 level is high enough to ensure that fly-by-night-operators cannot enter the business—make a fast buck and evaporate leaving both shippers and carriers at a loss for monies due and services unperformed.

Question 11. Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (Sec. 21) gives the FMC this authority. The FMC has, for example, used this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts to prevent illegal rebating.

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?

A. Yes. The FMC must have the authority to obtain information, reports and have access to records if it is to regulate effectively common carriers engaged in U.S. commerce.

B. Yes. We believe the interpretation that Congress was weakening its resolve would be correct regardless of any statements made to the contrary. Congress would not only be weakening or scrapping the machinery to deal with illegal rebating but also would remove the FMC's ability to deal with discrimination, preference and virtually any other shipping statute violation. Section 21 has also been used to deal with questions involving the discriminatory acts of foreign lines and governments under section 19 of the 1920 Act.

If there are any further questions, Senator Inouye, or if the answers we have given require further elaboration or explanation for your needs, please let me know.

I again would like to emphasize the points made in my statement on behalf of the International Association of NVOCCs to the Committee on S. 1593 on September 24, 1981. It is incomprehensible to our industry that S. 1593 excludes *only* NVOCCs from the ability and right to file intermodal tariffs or to file agreements for FMC approval, while granting such freight to file intermodal tariffs to vessel operators and conferences and granting such right to file agreements to *all other entities* in the ocean transportation industry, including freight forwarders, warehousemen, stevedoring companies, those furnishing wharfage, dock and other terminal facilities, and consolidating in connection with an ocean common carrier (defined so as to exclude NVOCCs).

If I were representing interests seeking to restrain or eliminate NVOCC competition and NVOCC services to shippers of small shipments, I could not have deliberately drafted any more effective legislation to accomplish this purpose. We beseech you to make certain that those sections cited in my September 24 statement be amended to prevent this serious harm and possible destruction to the NVOCC industry.

In accordance with Chairman Gorton's remarks at the hearing on September 24, we would greatly appreciate having this letter made a part of the record of the hearings on S. 1593 and S. 125 as a supplement to the Statement on behalf of the International Association of NVOCCs. I am also enclosing brochures of the Association which describe the operations and services of NVOCCs.

Sincerely,

Raymond P. deMember,
Executive Vice President, General Counsel.

Senator **Gorton**. The final witness is Mr. Harry de Venoge of the Adherence Group.

STATEMENT OF HARRY de VENOGE, GENERAL COUNSEL, THE ADHERENCE GROUP, INC., ACCOMPANIED BY JOSEPH GERASOLO, EXECUTIVE VICE PRESIDENT

Mr. **de Venoge**. Good morning, Mr. Chairman. My name is Harry de Venoge. I am general counsel of the Adherence Group, Inc., an independent organization dedicated to serving the steamship industry as a neutral self-policing authority. I am accompanied by Joseph Gerasolo, our executive vice president.

I appeared before your subcommittee in March of 1977 and testified about the results of the independent study I conducted on behalf of the FMC concerning self-policing within the steamship conference system. I reported to your subcommittee that the conference chairman system of self-policing was, in my opinion, completely ineffectual. I declared that the neutral body system for policing conferences was the only viable approach.

I undertook my study in April of 1976 with no steamship experience. My area of expertise was in Federal law enforcement. The sources of information from my study were basically individuals associated with carriers and steamship conferences. The conclusions I arrived at were based on what was told to me by others. However, for the past 5½ years I have gained my own experience in this area having been associated both with the FMC and the Adherence Group.

I am firmly convinced that the statements and conclusions I offered in 1977 still obtain. Specifically, the neutral body system is the only viable approach to policing steamship conferences. The inclusion in the proposed legislation of the conference's requirement to be policed by the neutral body system is not a redundancy of the FMC's GO-7 but a necessary clear statement by the Congress of its initial intent in this regard in order that there will be no more attacks on GO-7.

However, independents should also be policed. The imposing of a neutral body system on steamship conferences has given independents free license to malpractice. Independents have not voluntarily submitted to self-policing except for a few isolated instances. The FMC has not, after its study in the matter, imposed the requirement; the only avenue left is through legislative action by this subcommittee.

TAG has commented previously to the FMC on the need for and feasibility of neutral body policing of independents, which, incidentally, has been submitted to staff, and I would like to have them be part of the record.

Senator GORTON. They will be.

Mr. DE VENOGE. I would now like to repeat some of the points then made. The comments are those of the Adherence Group and are not those of the conferences, their members, or independents for whom we have provided policing, inspection, and enforcement.

It should come as no surprise that TAG advocates neutral body policing of independents. What we testify to now is what TAG considers to be viable solutions to the problem areas for the neutral body policing of independents, such as violations, distribution of penalties, and most importantly, access to records of foreign lines.

Any discussion of policing independents necessarily encompasses the problem of access to foreign-based records of foreign independents. Through the very recent legislative history on the problem of availability of records, and the comments from the numerous Federal agencies having an interest in the foreign line records issue, we discern a disturbing lack of knowledge or appreciation from the Congress and the Federal agencies, other than the Federal Maritime Commission, that foreign conference lines routinely, on a day-to-day basis, make their records available to neutral bodies. What we are pinpointing here as the solution of having neutral bodies police independents also encompasses the corollary solution of access to the records of foreign independent lines.

With a neutral body having authority from conference members and independents to review their records, there really is no substantial foreign carrier records problem and no need for a confrontation between the Congress and our foreign trading partners.

Policing of independents by the Commission, with required cooperation of the Justice and State Departments when foreign records are needed, is equally infeasible for independents as it is for conference members. The Federal Maritime Commission apparently has reached the same conclusion insofar as independents are concerned. The difficult problem of access to records of foreign independent lines is only the tip of the iceberg. Probably just as important are the bureaucratic problems of the Commission acquiring the staff, finances, and support services to police independents in foreign countries, which would not be accepted in any case.

Foreign lines do make records available to neutral bodies when the violation being investigated is that of an agreement, and not that of a U.S. law being investigated by a Federal agency. In consideration of this known fact, the exercise of the Congress in addressing itself to independents should be in strengthening the neutral body concept.

The Commission, Congress, its staff, and the courts recognize the unique circumstances that argue against policing of the shipping industry by governmental agencies. The neutral body solution should receive a legislative mandate specifying not only for independents but also for conference members a semiannual audit of office records and a physical inspection of cargo.

What has not been addressed by the various legislative proposals for stopping rebates is the ongoing policing requirement. There has been much ado about making records available for specific, isolated investigative needs, but no discussion on the need for an ongoing investigative and inspection capability.

What would happen if all the foreign lines did agree to make their records available? This consideration is especially vital in light of the statistic less than 5 percent of U.S. imports and exports are carried on U.S. vessels.

Who would provide the ncessary office audits in foreign countries?

Who would inspect cargo destined for the United States?

Who would answer the day-to-day investigative requirements, including "self-initiated" investigations needed to police a trade?

Who would implement an intelligence-gathering capability in foreign countries?

The answer to these questions could be quite an embarrassment to the involved Government agencies, because we all know the answer is nobody. The proposed section 12, prohibited acts, of S. 1593 is nothing more than a paper tiger for independents unless the proposed legislation is amended to include them to be under the jurisdiction of the conferences' neutral body policing the trade.

The Commission now is inadequately staffed to police independents in the United States, and it can be stated as a certainty that OMB will not give to it the extensive investigative resources to provide "adequate" policing of independents, not only overseas but also here in the United States, for such areas as cargo inspection and office audits. The policing of independents is feasible, but only by a competent neutral body supported by Commission regulations.

Given the position that the policing of conferences by conference members proved to be farcical, as witnessed by the Commission's long experience with the conference chairman concept, the alternative that independents police themselves—that is, a fox police himself—need not be dwelled upon by TAG. Eliminating internal policing and Commission policing, the only alternative is the neutral body system.

What we do propose is for that neutral body which is policing the most lines in a trade be assigned responsibility to police the independents in that trade. To allow the independents to hire a neutral body whose only activity is the policing of independents would make their objectivity suspect. Often times, conference line malpractices are reactions to violations by unpoliced independents. Only a neutral body with jurisdiction over both parties can address the malpractice properly.

The policing provided by TAG would be under the same requirements as contained in GO-7's guidelines for policing for a conference. The problem areas for policing independents can be addressed through the same regulatory process as are conference members. Brought under the same standard of neutral body policing, there will be an equal application of policing and, most importantly, enforcement. Even if two ethical neutral bodies were providing enforcement for the lines, one for the conference members and one for the independents, the probability of a uniform penalty process would be remote. The uneven application of sentences by judges in IRS matters is a proof of this contention.

Under TAG's proposal, the independents would contract with the neutral body policing the conference members in that trade. The sine qua non for our proposal is that all the conference members and independents be signatories to the same self-policing agreement. This requirement solves the problem of what is a violation and how to assess and distribute penalties.

Penalties would be assessed pursuant to the criteria of the self-policing agreement. Distribution of fines would be on a pro rata basis to those conference members and independents who were not involved in the malpractices. Here, the independent would share in the distribution as though it were a conference member, using the formula now in being in the conference. I know of no other alternative for the distribution of penalties.

The proposal of one neutral body policing a trade also addresses what will surely be a major obstacle, that is the cost factor. By simply adding the office audit, cargo inspection, and investigative costs for each independent line, plus the apportionment of administrative overhead, the neutral body should be able to police the independents for a reasonable fee.

The cost factor of another neutral body policing an independent line could be so prohibitive that this consideration alone would preclude the hiring of the separate neutral body. Incidentally, TAG's experience has been that cargo inspection programs are self-sustaining and that some policing activities result in savings to a carrier.

The 1961 amendment to the Shipping Act, imposing the requirement of adequate self-policing on all conferences, was self-negating in defeating malpractices because it did not include independents. All a carrier has to do to be unpoliced is not join a conference. This inequity has been one of the factors in weakening the conference system.

We respectfully suggest that TAG's proposal should become a congressional imperative, which would remove the injustice which has been perpetrated for the past 20 years on foreign conference-oriented lines as well as practically all U.S. steamship companies.

Thank you, Mr. Chairman.

Senator GORTON. Why should the self-policing requirement also include cargo inspection?

Mr. DE VENOGE. In the area of the container which is on the dock, our experience has been that oftentimes there is a misrating—this is either through a misdescription or some other device—whereby the carrier does not know what is in the container. This is an honor system on behalf of the shippers.

Our experience has been shippers, on occasion—either advertently or inadvertently—do misdeclare cargo. Our experience has also been—to indicate the extent of this, whenever we are retained in providing a cargo inspection system, the cost is self-sustaining, especially in the beginning.

Senator GORTON. Doesn't the system you propose really compromise the independence of the independent carriers?

What does it leave for them of their independence?

Mr. de Venoge. I'm sorry, Senator, but I'm coming from the other side. I'm trying to say that conference members and independents should be treated equally. They want to trade in the U.S. foreign commerce, and this should be the price which foreign lines pay, and the U.S. lines have to adhere to this. So, there should be an equal application of the law, of the Shipping Act.

This question was addressed by Senator Inouye last Monday several times: Is there equal application of the law? And I believe, so far as the Shipping Act, the prohibited acts, there is not an equal application.

Senator Gorton. We thank you very much. That's been a most interesting testimony.

Senator Inouye may very well have additional written questions for you.

Mr. de Venoge. Thank you, Mr. Chairman.

Senator Gorton. We appreciate your contribution.

[The following information was subsequently received for the record:]

The Adherence Group, Inc.,
New York, N.Y., October 8, 1981.

Senator Inouye,
U.S. Senate, 105 Senate Office Building, Washington, D.C.

Dear Senator Inouye: In response to questions posed by your staff concerning pertinent matters of interest with regard to the present ocean transportation bill now before the Senate, I am pleased to submit my answers to the questions as directed.

Question. "You state that foreign conferences routinely make their records available to neutral bodies?

The FMC had to go into court to get Baltic Steamship to comply with a subpoena duces tecum.

Are you saying that the kind of records the FMC was after in Baltic would have been routinely turned over to a neutral body?"

Answer. In all my experience over the past ten years working with a neutral body in conferences encompassing operations of non-U.S. flag owners. I can state without hesitation that my organization has received full cooperation with respect to records and documentation sought by us in the course of our neutral body self-policing programs. The kind of material and the type of records sought by the FMC in the Baltic Shipping case have routinely been made available for our inspection and copying if we deemed necessary. As early as 1972 the question of availability of records to a non-governmental neutral body was settled and agreed in the conferences where we have operated and we continue to enjoy this freedom of access.

Question. "If the requirement to file tariffs was removed, what would be some of the possible adverse consequences in the U.S. liner trades?"

Answer. In my opinion if there was no longer a requirement to file tariffs and all carriers would then have complete freedom to establish rates without U.S. Government oversight and regulation, chaos would result in the U.S. liner trades. The first victims of this chaotic situation would be the U.S. flag carriers. At present there is no protection from the dumping of excess cargo capacity by foreign flag operators in the foreign commerce of the U.S. If this abhorrent situation were to be further exacerbated by the removal of any tariff filing regulations, the trades to and from the U.S. would become a "daily Dutch auction," prejudicial to those carriers dedicated to serving the American business community and equally prejudicial and discriminatory to importers and exporters of like commodities, none of whom could assume that they were being treated equally or fairly from a freight rate standpoint vis-a-vis their competitors.

Without some kind of tariff discipline competition would be absolutely predatory ensuring the survival of only those carriers with huge resources or the backing of their particular government. The only conceivable way to maintain a sense of order and responsibility and a competitive climate without a compulsory tariff filing would be to legislate mandatory conferences with the conference acting as the tariff publishing authority. Another option would be to legalize closed conferences which would also bring tariffs under centralized control.

The American flag carriers would suffer the impact of uncontrolled tariffs first because they are without exception the carriers with the highest capital and operating costs. Under a deregulated competitive climate these carriers could only survive during periods of heavy cargo movement when commercial leverage tends to force freight rates up.

Question. "If rate decreases are allowed to become effective upon publication and filing with the FMC, won't failure to require some advance notice encourage private, discriminatory arrangements between shippers and carriers and therefore not afford other shippers and carriers a reasonable opportunity to avail themselves of the lower rate?"

Answer. Any failure to require a reduction in freight rate to be implemented with advance notice would guarantee disruption and instability in the U.S. trades. The ability to publish a freight rate reduction with immediate effectiveness would simply lead to convenience rate making without regard to commercial realities, so that a carrier whose vessel and space available could very well resort to instant rate reductions, disrupting normal trading patterns, merely with the objective of filling cargo space. Additionally, the unstable conditions that would obtain if the requirement for advance notice of rate reduction were removed, would result in discriminatory practices prejudicial to shippers.

Question. "Should the FMC be deprived of power to require filing of special reports? The current Shipping Act (Sec. 21) gives the FMC this authority. The FMC has, for example, use this investigative tool in such cases as the Baltic Steamship investigation concerning the carriage of buses financed by the U.S. Government on Russian vessels.

The existing provisions of this section also authorize the FMC to require certain certifications and information from carriers, and others regarding their efforts *to prevent illegal rebating.*

(A) Do you believe any legislation we recommend should retain this authority for the FMC?

(B) If legislation took this authority away, might not some carriers interpret this as a signal Congress was weakening in its resolve against illegal rebating?"

Answer. The policing of steamship companies, particularly foreign flag operators, is a sensitive and difficult operation at best. In our experience the most successful self-policing programs are those where the steamship owners, and in particular the Chief Executive Officers of those companies, are themselves involved in the policing process through required certifications and affidavits as they are now presently legislated under Section 21 of the current Shipping Act. We strongly recommend that this particular authority be retained for the FMC because the required acknowledgement on the part of the top policy level of the carriers that there is acceptance and recognition by that level of management that rebating and malpractices in the American trades are illegal, to our mind, is imperative and effective because it involves the personal integrity of the heads of the various companies.

Question. "Should legislation mandate "self-policing" by neutral bodies for all independent carriers, even if the independent's share of cargo in a specific trade is relatively insignificant?"

Answer. Our response to the question of whether legislation should mandate "self-policing" by neutral bodies for all independent carriers, even if the independent's share of cargo in a specific trade is relatively insignificant, is prefaced by the requirement that all independents must submit to the jurisdiction of the neutral body policing the trade involved. As part of this, the independent should make its records available upon request.

As to the specific question of cost for a Line, even though it has insignificant trade, is responded to by our position that each minimal carrier should submit to a minimum amount of several days of oversight entailing office audits and cargo inspection. The cost for this should be no more than $1,000 for a Line, billed on an hourly basis.

If the oversight develops a suspicion which would cause the neutral body to self initiate an investigation, then the investigation conducted should be charged for at an hourly fee of $40 to $50, payable by the independent.

Conference membes continually complain about the malpractices of independents. If they are really concerned then they should agree to pay for the cost of the investigation conducted as a result of the allegation made to the neutral body. Independents would have the same recourse. If the allegation proves to be correct, then the penalty imposed against the Line would include the investigative cost incurred by the neutral body. The remaining penalty would be distributed amongst those Lines in the trade in proportion to their contribution to neutral body expenses so that this expense item could be lessened for those Lines adhering to their tariffs.

Hoping that the answers included herein are responsive to your needs, I remain.

Yours most sincerely,

MANUEL DIAZ, *President.*

[Whereupon, at 11:50 a.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF AUSTRALIA/EASTERN U.S.A. SHIPPING CONFERENCE, ET AL.

This statement is submitted in support of S. 1593 by the following ocean steamship Conferences and Rate Agreements (hereinafter referred to as "Conferences"):

Australia/Eastern U.S.A. Shipping Conference.
The "8900" Lines Agreement.
Greece/United States Atlantic Rate Agreement.
Iberian/U.S. North Atlantic Westbound Freight Conference.
Israel/U.S. North Atlantic Ports Westbound Freight Conference.
Italy, South France, South Spain, Portugal/U.S. Gulf And The Island of Puerto Rico Conference.
Marseilles North Atlantic U.S.A. Freight Conference.
Mediterranean-North Pacific Coast Freight Conference.
New Zealand/U.S. Atlantic & Gulf Shipping Lines Rate Agreement.
North Atlantic/Israel Freight Conference.
North Atlantic Mediterranean Freight Conference.
U.S. Atlantic & Gulf/Australia-New Zealand Conference.
U.S. North Atlantic Spain Rate Agreement.
U.S. Sourth Atlantic/Spanish, Portuguese, Moroccan And Mediterranean Rate Agreement.
The West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference.

As is apparent from their names, these Conferences serve U.S. commerce in numerous trades, including the Mediterranean Sea, Arabian Gulf, Australia and New Zealand. The ocean carrier members of these Conferences are as diverse as the areas they serve: Some are large public companies, some are relatively small; some operate under the U.S. flag, some under the Italian, Australian, Israeli and other flags; some are privately owned, while others have government affiliations or support.

Despite this great variety of backgrounds, the Conferences and their members are unanimous on one point: United States regulation of liner shipping is in need of immediate and radical revision. We, the Conferences which serve U.S. foreign commerce under this system, find it imposing ever-increasing costs and obligations and unacceptable legal risks. To put it bluntly, we find the system intolerable.

We deeply appreciate recognition of these difficulties by the bill's sponsors. S. 1593 goes a long way toward restoring balance, fairness, and certainty to the system. Therefore, as more fully discussed below, we strongly support the major concepts of the bill and, in the attached Appendix, offer several drafting suggestions which, in our view, will aid in achieving the goals of the bill's sponsors.

BACKGROUND—A SYSTEM STOOD ON ITS HEAD

So that our strong support for the bill can be fully appreciated, we would like to provide the Committee with some background information on the regulatory system and the tremendous difficulties it has caused for conferences, beginning with a very general description of the developments which make enactment of S. 1593 so necessary.

Since its enactment in 1916, the fundamental principle of the Shipping Act has been that cooperation between carriers should be encouraged and that such cooperative efforts will serve the public interest in the maritime transportation of goods in U.S. foreign commerce. Pursuant to this principle, individual ocean common carriers have entered into a comprehensive system of cooperative arrangements with other ocean common carriers. Under this system, the business organizations which provide ocean common carrier service, and the individuals who work in that system, have developed business habits and practices that are geared to extensive cooperation. We also note that the cooperative principle has been endorsed by the other major maritime nations, and that the cooperative practices employed by lines in the U.S. trades are fully permitted in non-U.S. commerce.

It was onto this stage that a series of judicial and administrative developments made a grand entrance, thrusting antitrust principles, with their emphasis on competition, into the midst of a cooperative international system. As will be described in greater detail, these decisions have turned the Shipping Act from a cooperative system into a schizophrenic non-system, under which carriers are told "you may cooperate but", and then are not told about a good many of the "buts". Thus, the present system still pays lip service to the general principle of cooperation, but has, with increasing frequency, punished the players for various cooperative efforts.

Let us turn now to a more specific description of the factors which have converged to make the existing regulatory system so unfair and unworkable, for it is only with an understanding of the specific problems that specific and enduring legislative solutions can be drafted and enacted. The present regulatory confusion began 15 years ago when the Supreme Court decided in the *Carnation* litigation that the antitrust laws apply to activities of conferences and ocean carriers if they step outside the antitrust immunity accorded to them by the FMC pursuant to Section 15 of the Shipping Act.[1] This was immediately expanded by a District Court decision holding that even if ocean carriers act under an approved immunity and the conduct is later found to run afoul of the Shipping Act, the antitrust immunity is forfeited retroactively.[2] Since 1966, therefore, liner shipping has been subject to regulation under both the Shipping Act and the antitrust laws.

This dual system has had a significant impact on all conferences. For each activity undertaken, it must be determined whether the activity falls within or without the conference's antitrust immunity. As we have learned, however, drawing that line is not always easy and sometimes requires nothing short of a gift of prophecy. And the problem has been exacerbated because while the courts have been expanding the reach of the antitrust laws over the shipping industry, the Federal Maritime Commission ("FMC") has, over the same period, decided a series of cases adopting more restrictive readings of the scope of agreements it has approved under section 15.

If a conference activity is interpreted to fall outside its approved antitrust immunity, the exposure is enormous. Since the antitrust laws were amended in 1974, violations are now felonies carrying three year jail terms, and fines of $100,000 for individuals and $1,000,000 for corporations. There is also the added spectre of private treble damage actions, which have no counterpart in any other country of the world.

It is against this background of fear that conferences now function. As a result, meritorious activities about which there is the slightest question are not undertaken. As FMC Chairman Green noted in his appearance before this Subcommittee on September 21, the "confusion has reached the point where steamship liner operators are at times beset by a commercial paralysis and cannot be expected to react quickly to changing trade conditions."

Further, another court decision has made it even more difficult for the cooperative system to adjust to changed circumstances. In the *Svenska* decision, the Court held that the public interest standard in section 15 of the Shipping Act requires ocean carriers seeking approval of an agreement (and hence antitrust immunity) to carry a heavy burden in order to prevail.[3] That Congress had found such agreements benefical was no longer adequate. Each agreement and amendment had to be justified. Further, under another line of judicial precedents, those opposing approval of agreements were given the upper hand through the right to protracted evidentiary hearings prior to approval. Hence real barriers to obtaining antitrust immunity have been erected.

At the same time the law was changing, so, too, were the economics of the industry and the nature of services offered. Beginning in the 1960's and accelerating in the 1970's, container and other innovative vessels began to dominate. Because carriers invested in costly equipment such as containers and chassis that moved inland beyond the water's edge, and because this equipment and the cargo in it was easily transferable to motor and rail, ocean carriers (and hence conferences) became intimately involved in inland transportation.

The confluence of these legal and economic changes had a profound effect on the regulatory system, on the agency administering it (the FMC), and, of course, on conferences. The result was that conferences and ocean carriers began to file an ever-increasing number of agreements and amendments with the FMC—many out of an abundance of caution—in an attempt to avoid the legal exposure created by *Carnation* and *Sabre*. A number of these conference agreements, such as agreements governing where meetings are held, whether voting may be by proxy, etc., are truly of no significance to anyone except the members. These filings are again a result of the atmosphere of legal uncertainty in which the industry finds itself. In addition, an avalanche of filings with the FMC was triggered by intermodalism, as carriers and conferences sought to bring their legal arrangements into conformity with the new realties and and necessities of intermodalism.

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[1] *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966).

[2] *Sabre Shipping Corp.* v. *American President Lines,* 285 F.Supp. 949 (S.D.N.Y. 1968), aff'd, 407 F.2d 173 (2d Cir.), cert. denied, 395 U.S. 922 (1969).

[3] *F.M.C.* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968).

While the number of filed agreements was increasing, so too were the complexities and delays in processing. This was due not only to the volume of agreements, but to the heavy *Svenska* burden which the Commission embraced and expanded in a series of decisions to the point that an economic study is necessary to support approval of the more meaningful agreements. Because of these barriers, most conferences frequently forego necessary amendments because of the anticipated costs and delays which are now uniformly experienced with most amendments of any significance.

Then, in the early to mid 1970's the Conferences' diffulties with the system were increased as the Antitrust Division of the Department of Justice began to devote more attention to ocean shipping. The Department began to intervene in FMC proceedings by filing an increasing number of protests to approval of agreements, uniformly seeking evidentiary hearings, and taking the FMC to court when it disagreed with the results. Frequently, the Department was the sole opposition to approval of conference agreements or amendments. This has not gone unnoticed. As one federal judge recently commented in a case in which the Department of Justice challenged an FMC approval, there are "incongruities" when federal agencies bring interagency disputes to court, and it is a "tragicomic spectacle presented to international shippers who must wait while the U.S. government sues itself . . . ."[4]

Two of our recent experiences illustrate how the system function or, more accurately, shows how it has, quite literally broken down.

In 1976, the major line carriers serving the trade from Italy to the U.S. North Atlantic agreed to form a cargo revenue pool agreement to ameliorate the destructively competitive situation in the trade. The agreement was filed with the FMC for approval in February 1977. The Department of Justice filed a protest and a formal hearing was held in which the Department was the only protesting party to appear. After extensive evidentiary hearings, the FMC staff (Bureau of Hearing Counsel) recommended approval of the pool and the FMC Administrative Law Judge, in his Initial Decision, recommended approval.

However, the Department of Justice filed exceptions to the Initial Decision and the matter was next considered by the FMC. It unanimously approved the Agreement in January of 1979 for a three year period. The Department of Justice then challenged that approval in the Court of Appeals (D.C. Circuit). The Court unanimously affirmed the FMC's decision on December 29, 1980. Final approval of an agreement ultimately determined to be necessary to meet a "serious transportation need" thus required nearly four full years of litigation. The pool first agreed upon in 1976 began operations in 1981.

A second recent experience also illustrates how difficult it is for conferences to function under the system. The U.S. Atlantic and Gulf/Australia-New Zealand Conference filed with the FMC an amendment to its agreement to provide authority over intermodal movements. It was filed on December 4, 1978. The Department of Justice protested approval. Two and one half years later, in mid 1981, the Commission, in a spit decision, refused to approve the amendment, but gave the Conference the opportunity to show it had a right to go to a formal hearing at which it could seek to carry its heavy burden for approval. Such a hearing would take an additional two to three years.

In describing these two examples, our purpose is not to place blame or to discuss the merits of the propsals or decisions, but to illustrate how truly unworkable the system has become and the effects of this regulatory quagmire on business people who are trying to react to changing conditions. In the Italian situation, the FMC staff, Administrative Law Judge, the five FMC Commissioners, and three federal judges thought the agreement justified, yet it took four years to obtain an approval which, as a practical matter, was good for a fifteen month period. In the Australian case, a conference was denied intermodal authority similar to that which had previously been approved by the Commission for a number of other conferences. That decision, reached without a hearing, took two and one-half years and, if the Conference should pursue the matter through a formal hearing, it would most likely take an additional two or three a formal hearing, it would most likely take an additional two or three years (for a total of four or five years) to obtain a decision on whether the Conference should have intermodal authority.

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[4] *United States* v. *F.M.C.*, 2 F. 2d ——, No. 79-1325 (D.C. Cir., Dec. 29, 1980) (Opinion of Judge Markey, slip op. at 1 n.1).

This kind of regulatory waste simply must not be allowed to continue. The Congress must act strongly, clearly, and promptly. Whether carriers should be able to form pools, whether conferences should have authority over intermodal activities, and other such fundamental policy questions are not appropriate matter for case by case litigation. Such an approach effectively precludes these arrangements. Whether these arrangements should be permitted is a policy issue which Congress must decide. Under the present system conferences are, quite literally, required to rejustify section 15 of the Shipping Act with each agreement they file. This has proved costly, wasteful and, in the end, impossible.

As Senator Gorton aptly noted in introducing this legislation: "The Shipping Act of 1916 was originally designed to recognize the validity of the conference system and to insulate it from the antitrust laws of the United States. But that policy has, for all practical purposes, been stood on its head. . . ."[5]

THE PROVISIONS OF S. 1593

S. 1593 properly seeks to right the regulatory scheme so that:

(1) Ocean carriers and conferences are not exposed to the antitrust laws;

(2) Ocean carriers and conferences have (and should have) authority to engage in intermodal services; and

(3) Processing of section 15 agreements by the FMC is simplified and expedited under procedures which ensure that decisions will adhere to the Congressional policy judgment that cooperative agreements among ocean carriers are to be encouraged.

We would now like to turn to S. 1593 and how its provisions would accomplish these three objectives.

(1) Elimination of application of the antitrust laws

As Senator Gorton noted in his remarks accompanying the introduction of S. 1593, a prime purpose of the bill is to eliminate the application of the U.S. antitrust laws to liner shipping. The Conferences believe this is essential. The fear of the antitrust laws has grown to a point where it threatens the ability of conferences to function as intended by Congress. The antitrust laws are incompatible with the cooperative principles of the Shipping Act, the conference concept, and the international character of ocean shipping. To seek to harmonize two diametrically contrary concepts—cooperation under the Shipping Act versus competition under the antitrust laws—is simply not feasible. It has resulted in waste, uncertainty, unfairness and, in the final analysis, has failed to achieve the benefits of either cooperation or competition.

Due to the expansive reading the courts have given to the antitrust laws, any antitrust exemption must be clear, all-encompassing and unequivocal. If not, we fear a repetition of the past, where courts have strained to reintroduce the application of the antitrust laws to liner shipping. We are concerned that S. 1593, as presently drafted, would permit a court to construct such a result. Thus, in the Appendix we have suggested amendments to S. 1593 which would ensure the complete grant of antitrust immunity which the bill's sponsors seek to achieve.

While there are a variety of drafting approaches to this issue, several concepts must be kept in mind if the objective is to be accomplished. First, it must be made crystal clear that the antitrust laws could not apply to conduct even if found to be outside the scope of activities approved by the FMC. Short of this, the central dilemma and fears of the Conferences remain. Serious and unacceptable antitrust exposure would depend on the interpretation of the scope of an approved agreement—a determination which often cannot be made before the conduct occurs. Second, it must be made unambiguous that even when conduct appears to be within the scope of an approved agreement the antitrust exemption is not lost because the conduct may violate another provision of the Shipping Act. S. 1593 as introduced, may not close this loophole, as it appears that conduct which violates section 8 of the bill may not be exempt from the antitrust laws. In the Appendix we also address this drafting problem.

(2) Conferences must have intermodal authority

S. 1593 makes it clear that the FMC has jurisdiction over intermodal services and that it can therefore approve conference authority over intermodal matters. This clarification is vital, for it ensures that the law keeps pace with industry innovation.

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[5] Congressional Record S9231 (Aug. 3, 1981).

Not only will it eliminate a continuing source of litigation, it will confirm what, from our experience, is obvious: Without intermodal authority, the conference system may not survive and most certainly cannot achieve the objectives contemplated by the Shipping Act.

Since most ocean carriers services now extend to inland matters, a conference system authorized to regulate only the ocean portion of the transportation is playing with only half a deck or, in many situations, not even participating in the game. It makes little sense for a conference to establish and police ocean transportation rates when member lines are free to establish their own rates for intermodal services which may compete with services offered under the conference tariff and may not be policed under the conference system.

S. 1593 would, for the first time, define intermodal service and authorize intermodal agreements. We are in complete accord with these objectives. In the Appendix we suggest some changes in wording which we believe comport with existing commercial practices and are necessary if the conferences are to develop intermodalism to the benefit of the shipping public.

(3) Simplification and expedition of FMC process

S. 1593 recognizes the need to greatly simplify and expedite FMC processing of section 15 agreements. Substantively, section 6 of the bill eliminates the public interest/antitrust standard and properly places the burden of proof on parties opposing agreements. In other words, under the bill the general rule is that agreements are to be approved; disapproval will be the exception. We strongly endorse this change, which restores the original intent of the Shipping Act. To further ensure this result, however, we suggest that the Committee report on the bill make it impossible for subsequent decisions to seize on other general standards in the bill such as the "detrimental" to the "commerce of the United States" standard, as a basis for eroding the intent of Congress and reinjecting antitrust concerns into the process.

Procedurally, under sections 6 (e) and (f), the Commission must act on agreements within 180 days, with one 90-day good cause exception, failing which the agreement goes into effect. As noted, delay in acting on agreements has become one of the most vexing problems facing the Conferences. While we would prefer an even shorter approval period, the time frames in S. 1593 would be a significant improvement.

CONCLUSION

We believe that the prompt enactment of legislation which clearly achieves the objectives of the sponsors of S. 1593 is crucial to solving the problems of the present regulatory system. We thank the Subcommittee for the opportunity to submit this Statement in support of those objectives, and would be pleased to provide further information or assistance.

APPENDIX

RECOMMENDATIONS REGARDING S. 1593, THE PROPOSED "SHIPPING ACT OF 1981"

SECTION 2, DECLARATION OF POLICY

Proposed amendment

Page 2, line 12: Strike "and".

Page 2, line 17: Strike the period and insert in lieu thereof "; and (7) to permit ocean common carriers to conduct their international liner shipping and related intermodal activities with complete immunity from the antitrust laws."

Explanation

The declaration of policy in section 2 will provide important guidance to the Federal Maritime Commission (FMC) and the courts in interpreting the "Shipping Act of 1981". Thus, it seems important and logical that the policy statement be amended to provide explicit guidance with regard to what Senator Gorton has commendably described as the "core" of the bill: "a complete grant of antitrust immunity to conference activities."

SECTION 3(6), DEFINITION OF "CONFERENCE"

Proposed amendment

Page 4, line 2: Strike the semicolon after "service", insert a comma in lieu thereof and add "except that it does not mean a joint service, transshipment, or similar agreement."

Explanation

Section 3(6) of the bill, as introduced, would define "conference" more broadly than current usage, so as to include a number of cooperative or joint activities, such as joint service and transshipment agreements, which are not, today, generally referred to as "conference" activities. The bill would therefore subject such agreements to the provisions in section 5(c) and would thus require them to engage an independent body for self policing, provide that any limitation on membership be based on commercially reasonable criteria, etc. We believe, however, that the bill's sponsors intended the requirements of section 5(c) to apply to "conference" agreements as they are understood today. The proposed amendment, therefore, provides that agreements not generally considered as conference agreements be expected from the definition of a conference.

SECTION 3(8), DEFINITION OF "DEFERRED REBATE"

Proposed amendment

Page 4, line 18: Strike "an ocean" and insert in lieu thereof "a".

Explanation

The bill defines a "deferred rebate" in terms of actions by an "ocean common carrier". The proposed amendment would clarify what we presume to be the bill's intent, that the concept of a deferred rebate also apply to actions taken by non-vessel operating common carriers (NVOs).

SECTIONS 3(16) AND 3(19), DEFINITIONS OF "RATES" AND "SURCHARGE"

Proposed amendment

Page 6, line 14: Strike "means charges" and insert in lieu thereof "includes rates, charges, surcharges".

Page 6, line 23 through page 7, line 2: Strike the definition of "surcharge", section 3(19) (and renumber subsequent sections accordingly).

Explanation

The proposed amendment would delete the definition of "surcharge", section 3(19), and include the term "surcharge" in the definition of "rate", section 3(16). The proposed amendment would also conform the definition of "rate" to reflect that current industry usage distinguishes between "rates" and "charges".

We do not believe there is a need for a separate defintion of "surcharge." While section 9(b) of the bill recognizes the possible need to implement surcharges on less than 30 days notice, the bill also allows the Commission to authorize implementation of "rates" within that time frame. Since a surcharge is certainly only a component of a rate, there is no need for a separate reference to "surcharges" in section 9(b). Further, the definition of surcharge, in conjunction with the provisions of section 12(a)(6) (which we would also delete), could very well result in the development of a new and more extensive system of rate regulation by the Commission in the guise of surcharge regulation. Such increased regulation is clearly in contrast to Senator Gorton's expressed intent to reduce, not increase, government regulation of international liner shipping.

However, should the Committee choose to retain a definition of surcharge, we do have three comments on the wording of the definition. First, we believe that the concept of a surcharge should be limited explicitly to increases in rates, not "changes" in rates. As worded, there is a possibility that the definition could be construed as including rate decreases that are necessitated by a sudden decrease in costs. Thus, in combination with section 12(a)(6), the bill could be construed as subjecting carriers to penalties for failing to reduce rates in response to a "sudden or extraordinary" decrease in costs. We doubt that the Committee intended such a result. Second, the reference to "conferences" should be deleted. Only carriers, not conferences, incur changes in costs and revenues. Third, reference to changes in "revenues" should be deleted; surcharges arise due to changes in costs, not revenues.

SECTION 3(21), DEFINITION OF "THROUGH INTERMODAL RATE"

Proposed amendment

Page 7, lines 6-7: Strike "single amount charged" and insert in lieu thereof "factor or combination rate charged or collected".

Explanation

The amendment would conform the definition of a "through intermodal rate" to current commercial practices. Presently, tariffs for intermodal transportation are frequently published in a form which separately indicates the ocean portion and the inland portion of the through service. The through rate is the combination of these two rates.

SECTION 4, AUTHORIZED ACTIVITIES

General comment: In reviewing comments on section 4, it is important to consider the relationship between sections 4, 8, and 12 in the bill as introducted and the relationship between those sections as we would amend them. In general, we feel that sections 4, 8, and 12 should establish a statutory scheme which leaves no doubt that the bill achieves Senator Gorton's expressed intent to reverse the *Carnation* and *Sabre* decisions and provide a complete grant of antitrust immunity for international liner shipping (and related intermodal) activities in the foreign commerce of the United States.

Specifically, the thrust of the proposed amendments are: (1) to expand the list of section 4 activities to allow the broadest possible range of activities to be approved by the Commission pursuant to sections 5 and 6; and (2) to provide that violations of the Act (generally set forth in section 12, but also elsewhere in the bill) shall be subject to penalties or reparations under the Act, but not subject to the antitrust laws. This would allow the regulatory agency with expertise in shipping to assess any penalties in light of the gravity of an offense and also to permit a remedy to parties injured by violations.

SECTION 4(a), AUTHORIZED CONFERENCE ACTIVITIES

Proposed amendment

Page 7, lines 18-19: Strike the material on lines 18 and 19 and insert in lieu thereof "(a) OCEAN COMMON CARRIER AND CONFERENCE ACTIVITIES.—Ocean common carriers subject to this act may agree to—".

Explanation

The amendment would change the heading of the section to make clear that the activities authorized by this section may be undertaken by ocean common carriers which are not members of conferences and that the activities are not limited to conference activities. Joint activities in addition to conference activities, such as transshipment and sailing agreements, have been authorized under the present law and the bill should make clear that such activities would continue to be authorized. The amendment would also exclude "other persons subject to this Act" from section 4(a). Those persons are not engaged in the provision of transportation services, but only in offering ancillary services, and thus do not have the same need to enter into agreements with each other.

SECTION 4(a)(1)

Proposed amendment

Page 7, line 22: Insert between "services" and the semicolon ", and may give or receive special rates, accommodations, or other special privileges or advantages;".

Explanation

The proposed amendment would add to the list of activities authorized under section 4(a) activities which are authorized under section 15 of the present Shipping Act. We do not believe that the bill's sponsors intended to reduce the scope of presently authorized activities, and elimination of this provision could create an ambiguity in that regard.

SECTION 4(a)(6)

Proposed amendment

Page 8, line 6: Strike "or prevent competition among themselves and" and insert in lieu thereof "prevent, or destroy competition;".

Explanation

The proposed amendment would retain in the bill an activity which is authorized under section 15 of the present Shipping Act. Again, we do not believe that the bill's sponsors intended to reduce the scope of presently authorized activities, and the amendment would eliminate any ambiguity in that regard.

The proposed amendment would also delete the words "among themselves" from section 4(a)(6). This proposal is intended to further Senator Gorton's expressed intent to reverse the *Sabre* decision, in which an agreement was held to be outside the antitrust immunity conferred by the Shipping Act because it was found that one of the purposes of the agreement in question was to prevent or destroy competition from a non-conference member. Without deletion of the words "among themselves", conference agreements could continue to be subject to attack on *Sabre* grounds. This is particularly true in that section 4(a)(6) begins with the phrase "enter into other agreements", which could be interpreted as characterizing the terms of all agreements under section 4(a), not just agreements under section 4(a)(6), as being limited to agreements with regard to competition between the parties to the agreement. Finally, conference activities, like virtually all commercial enterprises in this world, are undertaken with a view toward improving the competitive position of conference members and, as such, could be viewed as a disadvantage to non-conference competitors. We feel strongly that the new law should accommodate this fundamental ecomomic truth.

SECTION 4(a)(8)

Proposed amendment

Page 8, line 7: Strike the period and insert in lieu thereof "; (8) restrain trade or commerce or monopolize or attempt to monopolize commerce or any part of commerce insofar as such agreements pertain to liner shipping, including intermodal activities, in the foreign commerce of the United States; and".

Explanation

The purpose of the amendment is to add a new section, 4(a)(8), which would make explicit that authorized agreements among ocean common carriers, insofar as they pertain to liner shipping, including intermodal activities, are coextensive with the proscriptions of the antitrust laws.

SECTION 4(a)(9)

Proposed amendment

Page 8, line 7: After proposed new section 4(a)(8), insert: "(9) consult and negotiate with shippers' councils regarding general rate levels, rules, practices, or services."

Explanation

The proposed amendment would explicitly provide ocean common carriers with authority to consult and negotiate with shippers councils, complementing the explicit authority that section 4(c)(3) would confer on shippers' councils to consult with ocean common carriers and conferences.

SECTION 4(b), INTERMODAL ACTIVITIES

Proposed amendment

Page 8, line 9: After "carriers" insert ", conferences,".

Page 8, lines 9–11: Strike "with each other or with any combination of air carriers, rail carriers, motor carriers or other common carriers by water".

Page 8, line 13: After "cargo" insert "with each other or with any air carrier, rail carrier, motor carrier, or other common carrier by water or any combination or number of such carriers".

Page 8, line 15: After "tariffs" insert "with each other or with any air carrier, rail carrier, motor carrier, or other common carrier by water, or any number or combination of such carriers".

Explanation

The first part of the amendment would make clear that conferences as well as individual ocean common carriers may enter into intermodal agreements.

The second change would make clear that individual air, rail, and motor carriers, and non-ocean common carriers by water, as well as any combination of such carriers, may enter into agreements with ocean common carriers or conferences. Finally, the amendment would restructure the wording of the provision by placing the references to air carriers, rail carriers, etc., in sections 4(b)(1) and (2), to ensure that the agreements filed with the FMC pursuant to Section 5 of the bill are only agreements between ocean common carriers. We suggest that report language make clear that it is not intended that agreements between ocean carriers and surface carriers would be filed with the FMC.

SECTION 5(C)(3), CONFERENCE AGREEMENT REQUIREMENTS

Proposed amendment

Page 9, line 20: Insert the following after "members" and before the semicolon: ", except provided that in respect to particular conferences, the Commission may dispense with this requirement for good cause shown".

Explanation

The services of an independent policing body impose additional costs on conference members which are ultimately passed on to shippers. Thus, to avoid needless increases in carrier and shipper costs, the statute should allow the Commission to exempt conferences from this requirement where, as under present law, another method of self policing is adequate. The proposed amendment would allow such an exemption and would thus permit the Commission to exempt, for example, agreements between only two carriers. This amendment is therefore consistent with the Commission's present practice.

SECTION 5(C)(5), CONFERENCE AGREEMENT REQUIREMENTS

Proposed amendment

Page 10, line 8: Strike "insure" and insert in lieu thereof "promote".

Page 10, line 9: Insert, after "disputes", "among member carriers".

Explanation

While the objectives of section 5(c)(5) should be pursued, it does not seem possible that any conference agreement could be designed to "insure" those objectives, such as the "commercial resolution of disputes." The bill should take the position of the proposed amendment, that the objectives of section 5(c)(5) can be promoted, but not insured. We note that the word "insure" also appears on page 10, line 25, with regard to shippers' council agreements. The amendment would also specify that the provisions of section 5(c)(5)(A) apply only to disputes between carrier members of a conference, which we presume is the intent of the bill.

SECTIONS 6(a) AND 6(b), ACTION ON AGREEMENTS

Proposed amendment

Page 11, lines 7–9: Strike section 6(a) (and renumber subsequent sections accordingly).

Page 11, line 13: Insert a new paragraph (1) as follows: "(1) does not conform to the requirements of section 5" (and renumber subsequent sections accordingly).

Explanation

The proposed amendment would delete subsection (a), which provides that any agreement not conforming to the requirements of section 5 shall be rejected. The amendment retains the requirement that agreements conform to the provisions of section 5, but would provide for a hearing before an agreement is disapproved or modified on section 5 grounds. Section 5 includes terms which are susceptible of varying interpretations. Thus, a summary rejection process should not be utilized.

Further, as drafted, the bill establishes, in effect, a two tier review by the Commission—one tier for section 5 and another, with hearing, for section 6(b) issues. Such a complex process is unnecessary and undesirable. Any section 5 issues may be more appropriately resolved in a hearing which could consider both those issues and the considerations set forth in present section 6(b).

SECTION 6(b)(2), COMMERCE DETRIMENTAL TO THE INTERST OF THE UNITED STATES

Comment: Present section 6(b)(2), which we would renumber as section 6(a)(3), would continue the requirement in the present Shipping Act that agreements be disapproved if they "operate to the detriment of the commerce of the United States". While we do not question the wisdom of continuing this standard as it has been interpreted to date, we think it important for either the bill or the legislative history to make clear that neither this general standard, nor any other general standard in the bill could be used as a new avenue for the injection of antitrust considerations into the agreement approval process. We commend the sponsors of S. 1593 for not including in the bill the "public interest" standard of the present law, which has been used as the basis for injecting antitrust considerations into the process. However, we note that when the "public interest" standard was enacted there was no comtemplation that it would be used to inject antitrust considerations into FMC deliberations. Thus, we are concerned that persons disagreeing with the policy goals of S. 1593 might try to argue that it is detrimental to U.S. commerce for the FMC to approve agreements which, but for the Shipping Act, would violate the antitrust laws. Thus, we support either statutory or report language to specifically preclude the Commission from weighing antitrust considerations in the agreement approval process.

SECTION 7(b), LOYALTY CONTRACT VIOLATIONS

Proposed amendment

Page 15, line 9: Insert "exclusively" after "treated".

Explanation

The proposed amendment would make clear that violation of the provisions of section 7(a) shall be treated as a violation of the Shipping Act and not as a violation of any other act.

SECTION 8, EXEMPTIONS FROM THE ANTITRUST LAWS

General comment: See general comment on section 4.

SECTION 8(a)

Proposed amendment

Page 15, line 13: After "4" and before the semicolon insert ", whether or not approved pursuant to section 6".

Page 15, line 14: Strike "that conforms with" and insert "whether or not conforming to".

Page 15, line 24: Strike the period and insert in lieu thereof "; and (6) any act prohibited by this Act or regulations promulgated pursuant to this Act."

Explanation

We believe that adoption of these proposed amendments is essential if the bill is to achieve its announced intention to reverse the *Carnation* and *Sabre* cases and provide international liner shipping activities with a complete grant of antitrust immunity. Each of the three parts of the proposed amendment is intended to ensure that the antitrust laws shall not apply to international liner shipping activities, even if those activities are found to be in violation of the Shipping Act.

As noted in the general comment to section 4, such an antitrust exemption would not encourage violations of the law. The bill provides a full and complete reparations remedy for private injury. Penalties could also be imposed by the FMC commensurate with the gravity of the offense.

SECTION 8(b)

Proposed amendment

Page 16, line 3: Strike "not subject to this Act." and insert in lieu thereof "except in connection with activities described in section 4(b)."

Explanation

This amendment would extend antitrust immunity to air carriers, rail carriers, motor carriers, and domestic common carriers by water for the purposes of intermodal activities described in section 4(b).

We believe that this amendment is essential if the grant of immunity to ocean common carriers for intermodal activities is to be meaningful. In a nutshell, we seriously question whether other types of carriers will enter into arrangements with conferences authorized under section 4(b) without assurance that they will not thereby become subject to the antitrust laws.

SECTION 9(a)(1), TARIFFS

Proposed amendment

Page 16, line 6: Strike "ocean".

Explanation

The amendment would make it clear that NVOs are to remain subject to tariff filing and related requirements, as under present law.

SECTION 11(C)(3), COMPENSATION OF AGENTS

Proposed amendment

Page 22, lines 22–24: Strike section 11(c)(3) (and renumber subsequent sections accordingly).

Explanation

An ocean common carrier, like any other business, must compensate its agents if those agents are to be expected to carry on business representations and activities on behalf of the carrier. Thus, the amendment would delete the bill's prohibition on the compensation of agents, which we believe was unintended.

SECTION 11(c)(4), COMPENSATION OF FRIEGHT FORWARDERS AND NVOS

Proposed amendment

Page 23, line 3: Strike "contained in" and insert in lieu thereof "required by".

Page 23, line 7: Strike the period and insert in lieu thereof "or has issued a bill of lading covering the ocean transportation of the shipment covered by the bill of lading or otherwise undertaken common carrier responsibility therefor."

Explanation

The proposed amendment would clarify that section 9 (a) does not contain tariff provisions, but requires them.

The amendment would also make clear that NVOs are subject to the prohibitions of section 11(c)(4).

SECTION 12, PROHIBITED ACTS

General comment: See general comment on section 4.

SECTION 12(a)

Proposed amendment

Page 23, line 9: Strike "ocean" each time it appears.

Explanation

The proposed amendment would clarify that NVOs are subject to the prohibitions of section 12(a).

SECTION 12(a)(6)

Proposed amendment

Page 24, lines 1-3: Strike section 12(a)(6) and renumber subsequent sections accordingly.

Explanation

Section 12(a)(6) would prohibit the continued imposition of "any surcharge after the increase in costs or loss of revenues that were the subject of the surcharge have been recovered." Under the bill, as introduced, if a carrier imposes a charge in the form of a "surcharge", section 3(19), it is subject to the provisions of section 12(a)(6) (and penalties for violations), but it is not subject to section 12(a)(6).

Thus, section 12(a)(6), in conjunction with the definition of surcharge, section 3(19) which we would also delete), could create a back door system of rate regulation, including a cost and revenue analysis. The Commission has never engaged in or been authorized to engage in such regulation regarding the foreign commerce. As surcharges are merely a component part of a total rate, we see no need to create a separate system of public utility regulation with regard to surcharges, and believe such an increase in regulation is inconsistent with the general thrust of the bill. Thus, we would delete section 12(a)(6).

SECTION 12(a)(8)

Proposed amendment

Page 24, line 12: Strike "or unfairly treat".

Explanation

The bill, as introduced, would develop an entirely new legal concept—a person "unfairly treated." We are unaware of any basis for extending the list of acts prohibited by section 12(a)(8) to include activities that cannot be characterized as unfairly or unjustly "discriminatory", concepts which have a history of legal interpretation.

SECTION 12(a)(9)

Proposed amendment

Page 24, lines 21-23: Insert a semicolon after "Fighting ship" and strike the remainder of present section 12(a)(9).

Explanation

The proposed amendment would ensure that the *Sabre* case is reversed by deleting reference to a prohibition against practices designed to "reduce or eliminate the participation of non-conference carriers." For a longer discussion of *Sabre* considerations, see the explanation of the proposed amendment to section 4(a)(6). The prohibition against the use of fighting ships has been retained, however, as that prohibition is well understood and has been in effect before the *Sabre* decision.

SECTION 12(c)

Proposed amendment

Page 25 lines 11-12: Strike "It shall be unlawful for any ocean" and insert in lieu thereof "No".

Page 25, line 13: After "Act" and before the dash, insert "may".

Page 25, line 14: Strike "to".

Explanation

The amendment makes clear that the prohibitions of this section operate against NVOs, as under present law.

SECTION 12(c)(2)

Proposed amendment

Page 26, line 13: Insert after the period "Nor shall it be prohibited for any ocean common carrier which is a party to a conference agreement approved pursuant to this Act, or any other person subject to this Act, or any receiver, trustee, lessee, agent, or employee of such carrier or person, or any other person authorized by such carrier to receive information, from giving information to the conference or any person, firm, corporation, or agency designed by the conference, or to prevent the conference or its designee from soliciting or receiving information for the purpose of determining whether a shipper or consignee has breached an agreement with the conference or its member lines or for the purpose of determining whether a member of the conference has breached the conference agreement, or for the purpose of compliing statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act shall be prohibited."

Explanation

The proposed amendment would continue provisions of section 20 of the present Shipping Act, under which carrier members of a conference may enforce its loyalty contracts, compile statistics, and enforce its conference agreements. In order for a conference to effectively function, it must be able to engage in such activities.

However, section 12(c)(2), as drafted, does not clearly allow these activities. for example, the provision would prevent receipt of information that "may be used to the detriment or prejudice" of a shipper. It is entirely possible that, under the bill, a shipper would be able to complain to the FMC that information was used to its "detriment" if the information was used in the setting of higher rates. As a result, conference members could be prevented from receiving and exchanging statistical data which is needed for setting rates for their transportation services. We seriously doubt that the bill was intended to prevent conference members from securing such information and data. In brief, we believe the proposed amendment, which would continue a provision of present law, is necessary if conferences are to effectively undertake the cooperative activities envisioned by the bill's sponsors.

SECTIONS 14(c), 14(d), 15(a), 15(b)

Proposed amendments

Page 28, lines 12 and 19, page 29, line 14, page 30, line 8: Strike "ocean".

Explanation

The proposed amendments would clarify that NVOs are subject to various prohibitions of the Act.

Statement of Boise Cascade Corp.

ANALYSIS ON NEO-BULK CARGOES

Traditionally, there have been two basic categories of ocean-going vessels carrying commercial cargoes:

A. General cargo carrying freighters

B. Bulk cargo carriers for dry bulk cargoes (grains, coals, ores, etc.) and for liquid bulk cargoes (mostly petroleum products), more recently there are carriers (so-called OBOs) which could be converted to carry either dry or liquid bulk cargoes as desired.

In this country general cargo found itself regulated, while it was recognized that bulk cargoes were so different in nature that they could not be brought under a common denominator with general cargoes in legislation.

Towards the middle of this century typical lumber carriers appeared on the high seas suitable to carry many different kinds of lumber, which cargo, in view of volume and its very nature, was hard to accommodate on general cargo carriers. It must have been for that reason that approximately in 1961 softwood lumber, logs, poles, piling and ties were exempted in the Shipping Act from tariff filing and conference loyalty obligations.

Traditionally, most general cargo carriers were similar in their basic configuration. They all had suitable lower hold space for products like plywood, woodpulp, linerboard, newsprint, steel products, etc., while the smaller items and more expensive products like grocery items, fine papers, machinery parts, etc., found feasible storage on the same vessels in the tween decks, lockers and reefer/freezer rooms. It was undoubtedly for that reason that historically all of these products carried on the same type of carriers in the same trades, could be legislated and tariffed in the same basic manner.

For various reasons of economy, the shipping industry during the 1960's went through the most drastic revolution since turning from sails to the steam engine. It became inevitable to concentrate on unitization of cargoes rather than to continue to hand stow every item into the vessel. At first, palletization of similar kinds of cargoes seemed to be the answer. As time went one, it was clear that this was not the only answer. More specialization was indicated and regular cargo freighters were literally turned into semi-container carriers. New ships were build worldwide which in configuration had little in common with the traditional freighter. With the aid of computers 20-foot, 24-foot, 35-foot and 40-foot vans were preplanned in cellular vessels and later on either lifted on board with a high degree of mechanization or driven on board, deepending on whether we dealt with a container vessel or a roll-on/roll-off vessel. Entier lighters (barges) with a capacity of 400 to 700 tons were designed to be loaded on a mother ship of some 30,000 dead weight ton capacity. For many catagories of cargo, the new designs proved to be a blessing for shippers, consignees and steamship companies alike. Certain cargoes however, like rolls of linerboard, woodpulp, news print, plywood, construction steel, etc., could not feasibly and/or economically be accommodated in the vans/containers and sometimes not even in the lighters; either the payload could not be made profitable to the carrier, or the freight rates became prohibitive for the trade. It became clear that we had created a new category of cargo quickly called "neo-bulk cargo".

The traditional bulk cargo carriers, the basic configuration of which had not changed during these years, were not found really suitable to accommodate these neo-bulk cargoes: The hatches were usually not large enough to provide adequate maneuverability nor was the loading gear sufficiently sophisticated to promote fast turn-arounds.

Since the progressively increased capital investments in the vessels made economic operation only feasible when also the turn-arounds could be accelerated, specifically designed neo-bulk carriers were introduced into the trade as recently as the 1970s.

Obviously, different economics rule the operation of the neo-bulk carriers than do the specialized general cargo carriers. When utilizing special cargo gear, neo-bulk cargoes may be considered units themselves and it obviously makes no sense to further utilize these units and lose economy in double handling and/or dead transportation space. It does not make economic sense either to have the neo-bulk cargoes rated by container carriers/lash carriers/ro-rc carriers/etc., who have the majority of votes in certain carrier groups.

Many of the reasons that prevailed when bulk cargoes and softwood lumber were exempted from certain parts of the Shipping Act, are now also valid for cargoes commonly termed as "neo-bulk". It is for that reason that we feel that these cargoes should not also be exempted, in order not to disturb the valid and proven economics of their special transportation requirements.

SYNOPSIS ON NEO-BULK CARGOES

For a number of reasons more fully explained in the enclosed Analysis on Neo-Bulk Cargoes, we have entered a proposal to exempt neo-bulk cargoes from the requirements of filing a tariff, and being subject to conference loyalty agreements. This proposal traced a similar exemption already provided for in present legislation for bulk cargoes (vide section 18(b)(1) of the Shipping Act of 1916); it was also designed to replace the exemption for softwood lumber which is also contained in the same section of the Shipping Act of 1916.

Needless to say that we were very pleased with the language of S. 1593 as it appeared on page 3, lines 7 through 15, page 15, line 5 and page 16, line 5. The proposal was offered primarily because of our concerns for our neo-bulk forest products, which we generally move on specially designed ships, which are usually not a part of a traditional liner vessel operation anymore. These cargoes do not qualify as purely bulk cargo because they don't always move in full shipload lot sizes, since one ship often carries the forest products of several different companies. They also do not meet the bulk cargo definition of being moved "without mark or count" since these products move in large prepackaged bundles that are in fact counted.

These cargoes move in large lot sizes—larger than container loads and up to full ship loads. They are also loaded and discharged using specialized equipment not generally used on standard liner vessels.

Neo-bulk cargoes in general include such products as iron and steel, fertilizers, chemicals and transport equipment, as well as forest products.

If during further hearings and consideration there would seem to be unsurmountable ambiguity about the term neo-bulk, we would suggest as an alternative to stay much closer to the language of section 18(b)(1) of the Shipping Act of 1916 as it is in force at the present time. Instead of adding a definition for neo-bulk cargoes to the one for bulk cargoes and deleting the reference to softwood lumber, etc., we would then suggest to extend the present exemption for softwood lumber to also include appropriate other forest products. In the context of S1593 the definition for bulk cargo could remain as is and a definition for forest products in an unfinished or semi-finished state moving in lot sizes which range from being too large for containers up to and including ship load lot sizes could be added and could include a further specification of commodities such as lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock and/or veneers, bundled particle and/or fiber boards, bundled hardboard, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls and paper in rolls. Staying with S1593, an addition should then be made in Section 7(a)(10) and in Section 9(a)(1) to also include an exclusion for "forest products in an unfinished or semi-finished state as specified in Section 3(3).

All of these products move in a neo-bulk fashion much different from the general cargo trade. They should, therefore, be exempted from general cargo regulation.

JOINT STATEMENT OF DONOVAN D. DAY, JR., CHAIRMAN, PACIFIC WESTBOUND CONFERENCE AND GERALD J. FLYNN, CHAIRMAN, FAR EAST CONFERENCE

Mr. Chairman, Members of the Committee, and Staff, we are grateful for the opportunity to present the views and suggestions of our conferences to this Committee.[1] This is particularly so because Senate Bill 1593 is the single most important piece of legislation concerning the regulation of the maritime industry since the Shipping Act of 1916.

The Pacific Westbound Conference (PWC) is the conference of ocean carriers in the trade from the West Coast of the United States and Canada to the full range of Far East countries from Siberia and Japan in the north to Thailand and the Republic of the Philippines in the south. In addition to the port-to-port service offered by the members, the Conference also has jurisdiction over intermodal traffic via United States and Canadian West Coast ports. This Conference is one of the major conferences in all the outbound United States trades, not only in volume of cargo, but in the number and importance of membership (consisting of sixteen regular members and two associate members). This membership represents the flags of nine nations: the United States of America, Japan, the Republic of the Philippines, Norway, Denmark, Hong Kong, the Republic of China, Israel and Korea.

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[1] The views expressed herein are the collective views of the conferences. Individual carrier members have in some instances commented separately or through organizations such as CENSA or CASO. We are aware of no conflicts in positions filed, but point out that the particularized views expressed by individual members of the conference elsewhere should not be considered as being in any respect modfied by these comments.

The Far East Conference (FEC) is one of the oldest conferences in the U.S. trades. Its jurisdiction covers the all-water route from the U.S. East Coast and Gulf ports through the Panama Canal to many of the Far East destinations served by the PWC.

The agreements of the two conferences reflect how whimsical the application of the standards of the existing Shipping Act has become. The PWC was granted intermodal rate authority by the FMC to serve the Far East via Pacific Coast ports while the FEC, serving the Far East via U.S. East Coast and Gulf ports, was denied intermodal authority.

The fundamental position of these Conference members regarding S. 1953 is one of solid, enthusiastic support.

We are most gratified by the efforts of this Committee to recognize and deal with the major problem areas in shipping regulation in one all-encompassing bill. This Bill affords the Congress an opportunity to address many of the important ocean shipping regulation issues in one proceeding and, when enacted, will be the first comprehensive statutory revision since the Shipping Act itself was enacted in 1916. Although we fully recognize that the entire Shipping Act of 1981 is important to the steamship industry, we will not attempt to address every section, but will limit our statements to those sections of most direct concern to steamship conferences.

The principal subjects which our comments will cover are the following:

(a) The vitally needed clarification that the international ocean liner industry is to be regulated by the criteria and sanctions of the Shipping Act and not be subject to additional regulation by the U.S. antitrust laws;

(b) The clarification of the antitrust immunity for intermodal agreements;

(c) The provisions relating to loyalty contracts together with suggestions for important additions to strengthen such contracts;

(d) The procedural revisions which would expedite FMC action on agreements and shift the burden of proof to protesting parties;

(e) The expanded subpoena and discovery powers granted to the FMC;

(f) The need for continued licensing requirements for freight forwarders; and

(g) Various miscellaneous matters.

SECTION 8—EXEMPTION FROM ANTITRUST LAWS

No subject has caused more apprehension, frustration and unnecessary litigation in the regulated shipping industry than the steady erosion—accelerating in the past 15 years—of the original congressional mandate that this industry should be regulated according to the standards and sanctions of the Shipping Act and not the U.S. domestic antitrust laws. The courts and the Department of Justice have not shared Congress' original perception that the international ocean shipping industry requires a regulatory scheme that is different from, and exclusive of, this country's domestic antitrust model. Over the years judicial decisions and Department of Justice attacks have demolished the boundaries which Congress originally established between the two regulatory schemes, with the result that the international shipping industry now must face on a daily basis the ominous prospect that any particular activity may someday be determined, after the fact, to have violated *both* regulatory schemes.

This Committee is well aware of this problem and section 8 of S. 1593 and other related provisions are a desperately needed statement reaffirming the distinct nature and regulatory requirements of the international ocean shipping industry. For this we are most grateful.

We also welcome Senator Gorton's introductory remarks on S. 1593 wherein he stated: "At the bill's core is a grant of complete antitrust immunity to conference activities. This is not only consistent with international shipping practice but would also remove a constant irritant between the United States and our foreign trading partners. It would restore the pre-Carnation case view that agreements for economic cooperation among carriers are considered to be subject exclusively to the Shipping Act, and not to other antitrust laws."

Senator Gorton also describes, correctly in our experience, the kinds of problems that ocean carriers face due to the constant threats and uncertainties of antitrust law enforcement notwithstanding the protection offered, or purportedly offered, under the present Shipping Act. Carriers and conferences are, in short, afraid to act in precisely the ways that they were expected to act when the Shipping Act, 1916, was enacted—to provide adequate and flexible carrier services at stable and predictable rates which the importers and exporters of this country require; to innovate and adapt the needs of the trades they serve and to deal efficiently with other modes of transportation as the developing technology of intermodalism provides new demands and new opportunities. The industry labors at present under legal uncertainties stemming directly from the *Carnation* and *Sabre* cases, from a plethora of less celebrated antitrust challenges in the lower courts and from incessant Department of Justice attempts to displace the Shipping Act with the antitrust laws. Conferences are virtually unable to take many actions which were clearly contemplated in their original agreements or amendments thereto—simply because it never has been and never will be possible to spell out in such documents every conceivable operational step which is necessary to operate a conference system in today's international ocean commerce.

Take one major transportation breakthrough—containerization—as an example of how full development has been restricted. The evolution of modern, specialized shipping containers and the ships designed to carry them has resulted in developments unknown when section 15 was enacted. Large amounts of cargo can move from the shipper's door to a foreign consignee's door by a combination of rail, truck, barge and ocean carrier without ever leaving the container. To make the system work, the use of transshipment arrangements has grown and entirely new types of rates have evolved. Equipment interchange arrangements between ocean and land carriers were created to permit the efficient movement of empty containers to shippers and to deal with imbalances of equipment between producing and consuming regions.

Even though the "container revolution" has been taking place over the course of more than twenty years, each of the steps of the system which enable it to work is still under attack on antitrust grounds. The joint rates and through routes arrived at between ocean carriers and overland carriers, of such benefit to this country's merchants, are a sad example. Because they were not in existence when section 15 was enacted, the Department of Justice believes that the FMC has no jurisdiction to provide antitrust immunity to conference intermodal agreements. Thus, the Department would deny to American shippers an efficient combination of intermodalism and the conference system which past Congresses have found to be the best method for preserving quality service and rate stability in our foreign commerce.

A conference offers a means of collectively providing transportation service on an international scale with stable, predictable rates and reliable service. The methods by which that service is provided should be judged and measured by standards which recognize and are tailored to the international character of the service rather than antitrust laws developed to cure domestic transportation problems.

Herein lies the specific problem that we wish to commend to this Committee's attention. The experience we have briefly outlined above has taught us that it is not enough simply to enumerate a list of activities to which the antitrust laws shall not be applied. The *Carnation* and *Sabre* cases—and any number of more current antitrust cases and threats of antitrust cases—teach that it is also necessary to define those additional areas that are intended to be regulated and sanctioned under the Shipping Act and not the antitrust laws. As we understand Senator Gorton's introductory remarks, this is exactly what is intended; we only wish to suggest that this intent be made abundantly clear so that the courts and the Department of Justice will get the message. The wording of section 5(a) might leave an inference that allegations in an antitrust suit that conduct which had not been specifically approved under section 5 was still subject to the antitrust laws. Any such inference should be removed by clear legislative history and by revising sections 13 and 15 to provide that the remedies and penalties included in those section constitute the exclusive sanctions or remedies of the Act.

Specifically, we are concerned that any carrier activities which may be found to have been prohibited under section 12(a) of the bill may, if the carrier or carriers had been acting pursuant to a conference agreement, give rise to antitrust penalties. This is the real spectre of the *Carnation* and *Sabre* cases and their progeny. It should be noted that section 12(a) contains some rather broad, normative standards such as "so unreasonably high or low as to be detrimental to the commerce of the United States" in section 12(a)(4), or "discriminatory", "unfair", "unfairly treat or unjustly discriminate" or "unjustly discriminatory", etc., in other subsections. Similarly, section 12(a)(5) is so broad as to make it impossible to know if a violation exists until the Commission has found a violation after developing all the facts. The prohibitions in section 12 do not have meaning until they are applied to particular fact situations. A carrier in most cases cannot know whether a particular activity is prohibited under these standards until the issue has been adjudicated. We are confident that this Committee does not intend that, in addition to the sanctions provided in this bill, the antitrust laws—with their treble damages and other penalties—should also apply. Yet this argument could be made, as it was successfully in the *Sabre* case, in the case of a carrier or carriers who clearly acted under a conference agreement, but who was found by the Commission after the fact to have charged unreasonably low rates. We therefore propose that this Committee consider an amendment which would make clear that the persons and activities that are regulated by the Shipping Act are subject solely to the criteria and sanctions of that Act, and not the antitrust laws or any other law. To accomplish this clear statement, we suggest that section 8(a) be revised as follows:

"(8) the requirements, standards, penalties and civil liabilities provided in this Act shall, as to the activities regulated herein of all common carriers by water, conferences, shippers' councils and other persons subject to this Act, be exclusive of all other laws, including specifically the antitrust laws; neither shall the antitrust laws apply (i) to any agreement that concerns or involves joint or through intermodal transportation or other transportation or related services between or within any foreign country or place, or (ii) to consultations with or activities of shippers' councils situated outside the United States."

SECTION 4(b)—INTERMODAL ACTIVITIES

A provision of the Bill of major importance to conferences generally and particularly to the Pacific Westbound Conference is the explicit authorization in section 4(b) of agreements which relate to joint or through rates.

The Pacific Westbound Conference has both minilandbridge tariffs and interior point intermodal tariffs also known as microbridge tariffs. They are a very important part the Conference activities and represent a substantial volume of traffic. It took, however, some three and one-half years in an FMC proceeding to finally obtain Conference authority to publish and utlize such intermodal tariffs. The conference not only had to hurdle the burdens imposed by *Svenska*, but a challenge by DOJ as to the authority of the FMC to approve any agreement involving intermodal rates. At this moment those intermodal tariffs are again in jeopardy by virtue of another challenge by the Justice Department of the authority of the FMC to permit or to authorize any intermodal ratemaking by conferences. That challenge is in the form of a case pending before the Court of Appeals for the District of Columbia Circuit and which will be argued in December (*United States* v. *FMC*). Passage of this Bill would settle that issue once and for all. Section 8, with the revisions suggested previously, together with section 6 and other provisions, will or should have the salutary effect of removing DOJ as the interloping regulator of the steamship industry and leaving that regulation with the FMC where it belongs.

The conferences have not entered into agreements between the Conference and railroads or other domestic carriers in connection with intermodal rates and there is no immediate industry need to do so. This Bill will govern industry conduct for a long time to come, and it should provide a framework for solution of the problems that are likely to arise in the future. It would be wise, therefore, to provide in the Bill that land carriers as a group and ocean carriers as a group were permitted, on an antitrust-exempt basis, to discuss and reach agreement as to the proportions of the through rate which would constitute the land carrier and ocean carrier divisions. Under current practices the Conference sets the overall intermodal rate and the land carrier division is left up to the individual carriers in the conference to negotiate with individual land carriers. The through intermodal rate is thus set by the ocean carrier without adequate knowledge in the long term of what portion of the rate will go to the important land component of the movement. This is particularly true when dealing with ICC-exempt commodities and other unregulated inland transport. Looking to the future, it may well be that more informed and stable rate setting would result if, as authorized by sections 4(b) and 5(c)(4)(B), the ocean carriers as a conference were able, should they choose to do so, to negotiate the divisions of through rates with groups of land carriers or with individual land carriers.

SECTION 7—LOYALTY CONTRACTS

The authorization for conferences to enter into loyalty contracts, heretofore generally referred to as exclusive patronage contracts or dual rate contracts, is of utmost importance to the conferences. The contract system goes to the very heart of the conference system because it is by means of such contracts that the carriers are provided a real incentive for conference membership and the shippers are provided with an assurance of the superior service which conferences provide. The value of a contract system is, however, measured in direct proportion to its enforceability.

Dual rate contracts were the principal subject of the 1961 amendments to the Shipping Act. The preface to Public Law 87-346 stated that its purpose was to amend the Shipping Act to authorize conferences "to enter into effective and fair dual rate contracts with shippers and consignees". The form of contract which was authorized, and which has been interpreted and administered by the FMC in the 20 years since Public Law 87-346 was enacted, has been proven time and time again to be a most ineffective instrument.

The dual rate contract was intended to be mutually beneficial to both carriers and shippers, but in many instances it has turned out to be a one-way street. By mutually beneficial, we mean that the carriers promise to provide sufficient and regular service at lower rates than are available to non-contract shippers. In return, the shippers who find this arrangement to their advantage promise that all of their cargo will be shipped with these carriers. Our experience is that most shippers honor both the letter and the spirit of their contracts, and we are proud to do business with them. Some shippers, however, manipulate their contracts, disregarding their obligations when they see fit, and we unfortunately see evidence of this at the Conferences practically every day.

The two large loopholes in the current contract are the "legal right" clause and the "affiliates" clause. It is these two provisions which defeat the most elementary requirement of any commercial contract—that of mutuality of obligation. A contract ~~is not a contract~~ in anything but name if one party—the conference—is bound, and the other party—the shipper—can, if it chooses, avoid the contractual obligations almost at will while the conference remains bound.

The essential problem with the legal right clause (so called because section 14(b) of the shipping Act, 1916, permits dual rate contracts to cover only the goods of a contract shipper over which he has the "legal right at the time of shipment to select the carrier") is that it provides a contract signator, which has pledged its shipments to the conference carriers in return for the superior conference service and lower contract rate, the option of abiding by the contrast or not, as best suits its purpose. What frequently occurs is that the U.S. exporter simply arranges to have the foreign buyer include in the sales documents a requirement that the shipment go non-conference, or to have the buyer specify a particular non-conference carrier. The seller then does not have the "right" to select the carrier and under the legal right clause is free to comply with the buyer's instructions. If it appears that non-conference service is not available, the sales contract will simply omit such a requirement. This same scheme can be used in reverse if the contract signator merchant is the importer in the foreign country. While this is a violation of a clause which states that the signator cannot by subterfuge avoid the contract, such violations are almost impossible to detect or prove. Thus the legal right clause gives the shipper who has no intention to be "loyal" the best of all worlds to the distinct disadvantage of the loyal shippers and the conference carriers.

The legal rights clause can be and is easily used to avoid dual rate contract obligations by several different means. Avoidance is usually accomplished by the simple device of the contract signator requesting that the consignee "instruct" him to ship via non-conference carrier. If such a request is made orally it is virtually impossible to discover and still more difficult to prove. Further, the request need not even be made directly; it may be enough to mention during contract formation that a particular non-conference carrier has a lower rate for the particular commodity but that unless directed otherwise a conference carrier must be used.

It is only in the event of shipper carelessness that this evasion is detected. For example, one breach of the PWC dual rate contract was resolved favorably to the Conference when a telex was produced in which the signator requested a backdated letter instructing shipment via a particular non-conference carrier as a condition of the sale. The backdated letter was intended to cover a shipment which had already moved. Such a requested instruction may also appear as a term of the letter of credit or, less directly, as an instruction to leave shipping arrangements to a particular freight forwarder or by passage of title and control of the shipment in the United States before the ocean carriage even begins.

Apart from the various subterfuges which may be employed, the contract may be breached by the signator shipper simply using a non-conference carrier and not reporting the action to the conference. In one recent case the fact of shipment via non-conference carrier was discovered only when the contract signator filed a complaint with the FMC alleging that it had been overcharged by the non-conference carrier.

The legal right clause has been carried over into section 7(a)(4) word-for-word with the exception of the last phrase reading "in any dispute under this paragraph the burden of proof shall be on the contract shipper." While that addition would appear to be helpful, we believe it would prove to be but a superficial aid in enforcing a contract.

The Conferences for which we speak believe that the legal right clause contained in section 7(a)(4) should be stricken from the Bill by deleting section 7(a)(4). If that clause is not stricken, then further attention is required to the problems of the use of affiliates to avoid dual rate contract obligations. The "affiliates clause" problem arises from the present language of section 14(b) of the Shipping Act, 1916, and the "Uniform Merchant's Contract" adopted by the FMC. The statute permits dual rate contracts between ocean carriers and conferences of such carriers and shippers and consignees without any apparent recognition that a single shipper may be one company in a large family of interrelated companies. The FMC's Uniform Merchant's Contract attempts to correct this oversight by defining "merchant" to include not only the signator, but also any of its "parent, subsidiary or other related companies or entities . . . over whom he regularly exercises direction and working control . . . in relation to shipping matters." The merchant is required to identify those related companies and bind them by the contract.

In spite of the contract language there has been a great deal of avoidance of contract obligations through this clause. It is all too simple for a signator simply to fail to list one or more related companies or to rationalize not doing so on the basis that it does not exercise a sufficient degree of control over the other company to bring it within the contract. The Conferences have also experienced companies disclaiming an inadequate relationship with unincorporated divisions or between unincorporated divisions.

At present, the burden is on the carrier or conference to prove contract breaches involving the affiliates clause, and it is difficult indeed for a conference, looking into a relationship from the outside, to prove either the exact nature of the relationship or the balance of control within the relationship. We recognize that in a general sense the burden of proof as to disputes under section 7(a)(4) is on the shipper. We urge, however, that if section 7(a)(4) is retained, the first sentence thereof should contain the following proviso at the end of the sentence to be certain that the Commission's existing regulations (46 CFR § 538.10) (clause 1(b) of the Uniform Contract), which permit loyalty contracts with shippers to include affiliates of shippers, are not set aside by the new law:

": Provided, however, That the contract may cover those goods of the contract shipper and the goods of any related companies or entities, including parents, subsidiaries, affiliates, branches or divisions or agents of shipping representatives acting on their behalf."

We further urge that the last sentence of the subsection be strengthened to enable more effective dealing with contract avoidance. This could be done by adding the following to the last sentence of section 7(a)(4): "and, if the contract shipper or any subsidiary or affiliate thereof has paid the freight on the shipment or shipments in dispute, the contract shipper shall have the further burden of rebutting a presumption that it had the legal right to select the ocean carrier on such shipment."

The foregoing provisions would not present any radical departure from existing law or practice. The FMC, for example, has proposed a rulemaking to add a rebuttable presumption relating to the legal rights clause issue. (Proposed Rulemaking, FMC Docket No. 81-54, 46 Fed. Reg. 44998, Sept. 9, 1981 (No. 174).) The placement of the burden of proof is simply a recognition that the contract shipper or consignee, not the conference, has the basic information concerning the affiliations. The suggestion regarding the affiliates clause is likewise a confirmation and emphasis of existing contract provisions approved by the FMC.

SECTION 6—ACTION ON AGREEMENTS

The Pacific Westbound Conference and far East Conference strongly endorse the aim and purpose of this section of the Bill, which is to expedite the approval procedure for agreements filed under section 5. That expedition will result not only from time limits imposed upon the Commission, but also because, as we read it, a presumption is given in favor of approvability (which the 1916 Act intended, but which Commission and court decisions have taken away), and because the burden is placed on a protestant to prove that the agreement conflicts with the standards of the Act.

The inclusion of section 6 with shortened time limits would be particularly gratifying to Pacific Westbound Conference, which has a history of suffering inordinate FMC delays in obtaining approval of agreements. As an example, PWC filed a routine, unopposed, clarifying amendment concerning cargo inspection activities in June of 1978 which was not approved until December 1980. PWC and several other conferences had also filed routine, unopposed, clarifying amendments concerning credit privileges which were finally, after 15 months, brought before a Commission meeting for consideration and were approved subject only to the condition that the words "freight and other" be inserted before the word "charges" in the clause "credit for payment of charges due". This seemingly meaningless amendment could easily have been proposed by the Commission staff upon filing and the agreements promptly approved. Section 6 would foreclose such administrative delay.

There are instances in which a single protest is filed to a conference amendment and, after months of staff consideration, the protest is deemed to be insubstantial and the agreement approved. The Department of Justice has become what might be termed a professional protestant to all manner of conference agreements, filing a standard document citing *Svenska* and decisions following that case. This combination of unnecessary staff delay, interminable consideration of non-substantial protests, and a narrow construction of which actions fall within the general enabling language of the standard conference agreement severely hampers constructive conference activities.

In many circumstances, however, 180 days can be too long to wait for approval of an agreement which may well have been enterd into to resolve an urgent problem. The solution, we believe, is a simple one—to give the Federal Maritime Commission discretion to approve agreements on an interim basis with full antitrust immunity at any time prior to the running of the 180-day period. this result, which is comparable to ICC procedures for issuing temporary motor carrier operating authority, could be achieved by the addition to a new section 6(h) reading as follows:

Interim Approval.—the Commission may, in its discretion, at any time prior to final decision on any agreement, grant an interim approval under its section to such agreement, such approval to remain effective until a final decision is rendered on the agreement.

Alternatively, serious consideration should be given to the CENSA proposal for temporary approval of agreements within 45 days after publication.

The Conferences have one further concern. The purpose of deleting the reference to the "public interest" in the present statute was to reverse the *Svenska* case, which read the public interest standard as requiring the Commission to apply antitrust standards to approval of agreements on top of contradictory Shipping Act standards. The reference in section 6(b)(2) of the Bill ("to operate to the detriment of the commerce of the United States") is troubling because it still might permit a court to use its rather indefinite terms to reincorporate the antitrust laws into the approval process. Either the "detriment to commerce" language ought to be deleted for this reason or the legislative history ought to be made absolutely clear that section 6(b)(2) does not incorporate antitrust standards into the agreement approval process.

SECTION 10—CONTROLLED CARRIERS

Section 10 appears to be a recodification of existing law, and so far as it goes, the conferences have no objection. A problem in application of the exemption provision (now recast in section 10(f)(3)) has surfaced, however, which requires the Committee's consideration.

Controlled carriers can, and when the Bill is enacted, may continue to join conferences. As conference members the rates they charge in accordance with the conference tariff would be exempted from section 10.

This Committee, in its report No. 95-1260, made it clear that when the controlled carrier exemptions were first considered the concern of the Committee was that controlled carriers not substantially and unfairly undercut conference rates. The Committee also made it clear that its intent was to "exempt the rates, charges, classifications, rules or regulations of a controlled carrier which are established pursuant to an agreement", and that rates set independently by a controlled carrier, even in connection with a section 15 agreement, remained subject to the act. The Committee's statement came as a result of a letter from the Chairman of the FMC in response to an inquiry from the Committee. The letter noted that the language as then proposed would exempt the indenpendent action rates set by controlled carriers who were members of 48-Hour Rate Agreements, and that the legislation would thus be rendered meaningless.

Since enactment of the Controlled Carrier Act as section 18(c) of the Shipping Act, a question has arisen as to whether "open" rates of conferences would allow controlled carriers to independently set rates while retaining the exemption. The Conferences agree that they should.

"Open" rates take two forms. First, rates may be "opened", but state a minimum rate which must be charged. Second, rates may be opened without a minimum rate. Conference action is required both to open a rate and to agree upon a minimum rate, and for those reasons the Confernce urges that the first type of open rate fits within the exemption.

The completely open rate should also be exempt, but for slightly different reasons. Conference action is required to open the rate in the first place, and the absence of a minimum rate indicates that the collective judgment is that members should be able to charge whatever they please for a particular commodity. Because the Conference itself has surrendered control over the rates to be charged, the protection intended by Congress in 1978 is unnecessary and the exemption should still apply. The Conferences strongly agree, however, that independent action rates set by controlled carrier members of conferences which permit independent action by such carriers as a matter of legal right should remain subject to the Act.

The exemption of conference open rates of controlled carriers would serve the purpose of the act by making conference membership (and thereby, conference control) more attractive to controlled carriers.

SECTION 14—EXPANDED DISCOVERY AND SUBPOENA POWERS; SECTION 6(g)—COMMISSION DISAPPROVAL OF AGREEMENTS FOR FAILURE TO SUBMIT TO SUBPOENAS OR DISCOVERY

While these two provisions are quite different, they both greatly expand the Commission's power to obtain records and information from carriers as well as from Conference offices and staff.

Section 14 is derived from the Anti-rebate Bill (Public Law 96-25) which added section 22(c) to the Shipping Act, 1916, but there is a very great difference. The Anti-rebate Bill by its terms and by its legislative history is limited to a Commission-instituted adjudicatory investigation of violations involving rebates or refunds. All of the discovery powers in that act were limited to that offense and that proceeding. Section 14, however, has carried over the subpoena and discovery powers of the Anti-rebate Bill to "investigations and adjudicatory proceedings under this Act" and may be used by "any party". That means that depositions, interrogatories and other discovery may be ordered by the Commission in any investigation instituted by the Commission or in any complaint proceeding brought by any private party against another private party under the Shipping Act. We do not read it as limiting such discovery to Commission counsel. Rather it includes the supplying of information "authorized to be obtained" by a Commission-issued subpoena or order. This is a devastating tool in the hands of competitors who may, in any Commission proceeding, seek discovery which if not produced can result in their competitor's tariffs being suspended and assessment of a fine of up to $50,000 for each shipment levied. This provision is bound to create, in addition to private injustices, disputes with any foreign governments, which may be justified in proceedings concerning rebates, but not in all proceedings brought before the Commission.

Careful attention needs to be given to authority to subpoena records located in foreign countries, since such subpoenas inevitably lead to conflict with other nations. This problem has already led to foreign "blocking" statutes and could lead to far more serious reprisals by foreign governments.

To deal with this problem we propose: (1) that sections 14 (c), (d) and (e) be limited to proceedings concerning Commission instituted investigations of rebating. In any event, however, such sections should not be made applicable to discovery initiated by private parties, since to provide such penalties to enforce private discovery demands will inevitably produce abuses of discovery up to and including extortionate demands.

As a further check on abuse of discovery the Committee may wish to consider limiting discovery to matter which is "relevant to the issues in the proceeding" as opposed to the present broader standard permitting discovery if it might lead to relevant evidence.

We also see no purpose in or objective to be attained by section 6(g) which would require conferences to comply with a "subpoena or discovery order lawfully issued by the Commission". Our problem is not with responding to lawful requests, but with the free and unfettered access to conference documents and officials without even a limitation that the subpoena or order be limited to matters of legitimate concern in the approval or disapproval of agreements. There is not even a requirement that reasonable notice be given. If this provision emanates from some request by the Commission, then the Commission should put on the record why it deems such unlimited power to be necessary and what harm has resulted to the public from not heretofore having such authority. Further, where the conference offices are located abroad, such activity conducted by the FMC would likely be resisted by the government where the office is located. Finally, the present provision means that if a single conference member on its own or on direction of its government does not comply with discovery, the entire agreement is placed at risk. Yet the particular member may have no significant stake in the outcome of an amendment being filed.

As currently written section 14 has two effects which we do not believe that the Committee intends. First, section 14(c) permits the Commission to suspend a carrier's tariffs following nothing more than a Commission hearing, with the only stated limitation being that the suspension may be disapproved by the President. Following such a suspension the carrier has no realistic remedy other than to cease operations (a carrier cannot lawfully operate without a tariff on file) while it attempted to obtain an injunction or stay of the suspension pending judicial review. An improperly issued administrative tariff suspension order puts a carrier, which may have hundreds of millions of invested dollars at stake, out of business at one stroke. This power far exceeds the subpoena/discovery power of any federal agencies of which we are aware. At a bare minimum, review and approval of tariff suspension by the Secretary of State or the President should occur before any suspension order becomes effective.

Second, carriers are unfairly disadvantaged by the tariff suspension section. A shipper, for instance, might file discovery demands to which the carrier has valid and lawful defenses. However, should the carrier lose in a Commission hearing under the loser evidentiary standards of administrative hearings it faces suspension of its tariffs. A shipper, on the other hand, has far less to lose should it refuse to make discovery. We believe that the Committee should correct these imbalances.

SECTIONS 3(3)(b), 7(a)(10), AND 9(a)(1)—DEFINITION OF "NEO-BULK" CARGO AND ITS EXEMPTION FROM TARIFF AND LOYALTY CONTRACT SYSTEMS

A potentially serious problem is raised by section 3(3)(B) which attempts to define something called "neo-bulk" cargo for inclusion within the meaning of the term "bulk cargo". This is significant because section 7(a)(10) requires that all "loyalty contracts" exclude "bulk cargo", and section (a)(1) exempts "bulk cargo" from all tariff filing requirements. The definition reads as follows:

"(B) cargo commonly termed "neo-bulk", such as forest products in an unfinished or semifinished state, which requires specialized handling and is moved in lot sizes which range from being too large for containers up to, and including, shipload lot sizes. . . ."

The difficulties in construing this language are enormous. The problem lies in the fact that the attempted definition of "neo-bulk" cargo is exceedingly vague and could conceivably cover a vast number of cargoes moving in ocean liner commerce, depending upon the way they are packaged and handled. For example, "forest products in an unfinished or semifinished state" could include items such as wood pulp or linerboard or corrugating medium—commodities which presently move pursuant to tariff and dual rate contract systems. Arguably, these are "semifinished" in that they are not yet ready for the retail market but must be further manufactured or combined to produce a finished product. These commodities move in considerable volumes in many of our oceanborne foreign trades, and to exclude them from the "loyalty contract" or tariff filing systems would seriously undermine the effectiveness of both systems.

Similarly, the phrase "which requires specialized handling and is moved in lot sizes which range from being too large for containers up to, and including, shipload lot sizes. . . ." is dangerously broad and difficult to apply. Almost any commodity that moves in ocean commerce can be packaged, e.g., unitized, bundled, strapped or otherwise combined, so as to exceed the dimensions of a standard shipping container. If by such means commodities can be taken out of the tariff filing and "loyalty contract" systems at the whim of carriers or shippers, then the systems will not have much, if any, meaning.

We submit that a more particularized approach would be preferable. Under present law neither "softwood lumber" nor "bulk cargo" (meaning cargo that is loaded and carried in bulk without mark or count) is subject to tariff filing requirements; however, softwood lumber and certain liquid bulk cargoes can be, and in some cases are, covered by approved dual rate contracts. If some change in this system is required, either as to tariff filing of "loyalty contract" systems, then we submit that the reasons should be specifically considered by this Committee on a case-by-case basis. The generalized approach represented by the proposed language of section 3(3)(B) does not provide a meaningful definition or standard for enforcement and would open up gaping loopholes in the very structures which this Bill is elsewhere attempting to continue and strengthen. Consideration should be given to defining bulk cargo as in the present Shipping Act (cargo loaded without mark or count).

SECTION 11—FREIGHT FORWARDERS

The Bill would significantly change the status quo with regard to freight forwarders. We believe that these changes, except for the increased bonding requirement, are undesirable, and that the existing regulatory scheme should be retained. The new provision eliminates the licensing of forwarders, which is essential to avoid rebating by payment of compensation to forwarders that may secretly be affiliated with shippers or which may serve as conduits for the transfer of rebates. Section

11(c)(4) is virtually unenforceable without the licensing of forwarders, since there is no workable way for a carrier or the Commission to ascertain shipper-forwarder affiliation on an ad hoc basis.

The licensing requirement also protects the public by requiring the freight forwarder to meet reasonable standards of competence and fitness. The increased bonding requirement is not an adequate substitute for this protection in an industry that, unfortunately, has been plagued by more than a few "fly by night" operators whose unlicensed activities have been harmful, particularly to small, unsophisticated shippers.

Section 11 also does not prevent a forwarder from acting as an NVOCC on the same shipment and collecting compensation thereon even though as an NVOCC it is acting in the role of a shipper, albeit one without a beneficial interest in the cargo. This would permit forwarders to compete unfairly with ocean carriers by offering competing rates as NVOCCs while at the same time demanding brokerage fees from carriers.

Section 11(c)(1) of the Bill contains language that, it might be argued, requires that the carrier "shall" compensate an ocean freight forwarder when two enumerated tasks are performed. There is no reason why carriers should be required to pay forwarder compensation if they believe the forwarder function to be unnecessary. The functions listed are readily performed by carriers themselves. The core concern over compensation of forwarders is not that they will not be paid. It is that they will be paid excessive sums which will secretly become rebates to shippers. We suggest substitution of the word "may" for the word "shall" in the provision.

ADDITIONAL MATTERS

(1) NVOCCs

The Bill, we assume inadvertently, excuses non-vessel operating common carriers (NVOCCs) from tariff filing requirements and therefore also from rejection of tariffs and penalties for operating without a tariff for noncompliance with discovery or Commission subpoenas. By the same token, since no NVOCC tariffs need to be filed, NVOCCs are free to rebate from their list prices as they please. The foregoing occurs because the definition of "ocean common carrier" appropriately excludes NVOCCs, but the requirements of sections 9 and 12(a) apply only to ocean common carriers. Finally, if NVOCCs are excused from tariff filing requirements, it will be impossible to distinguish an NVOCC from a "person engaged in consolidating" as defined in section 3(13). There a consolidator is defined as an "other person subject to the Act". Consolidators are therefore allowed to enter into FMC-approved agreements even though NVOCCs are not. In addition to requiring NVOCC tariff filing, we urge that this confusion be eliminated by excluding consolidators from the section 3(13) definition.

It is true that NVOCCs are shippers vis-a-vis ocean common carriers, but they are carriers vis-a-vis the shipping public. We know of no reason why NVOCC rates should be secret and not be filed as tariffs; we know of no reason why NVOCC rebating should be permitted; and we know of no reason why NVOCCs should be permitted to discriminate between shippers in the rates they charge or charge unreasonably high or low rates detrimental to U.S. commerce. We also know of no reason why NVOCCs who defy the Commission's processes should, unlike ocean common carriers, be free to continue operations. We suggest that sections 9, 12(a) and 14(c) be made applicable also to NVOCCs.

(2) Mutuality of remedy

We note with satisfaction that section 13 has corrected the unequal treatment accorded by present section 22, which currently allows reparations only for a violation "by a common carrier by water, or other person subject to this Act". Section 13(a) allows reparations for any injury caused by the Act. This would permit actions by carriers against shippers or others.

(3) Surcharges

Section 12(a)(6) provides that no ocean common carrier may "continue to impose any surcharge after the increase in costs or loss of revenues that were the subject of the surcharge have been recovered. This raises some potential problems. There are many different kinds of circumstances which require surcharges. Some may cease entirely to exist, some may be partially alleviated, or some new factors may intervene after the initial imposition. The weight given to different factors is often a matter of business judgment. The carrier should have an opportunity to be heard and any violation determined only after such hearing and determination. The provision as written could operate retroactively and unfairly.

Further, the circumstances leading to a conference-imposed surcharge may cease or diminish as to some mebers and even increase as to others. The members are bound to the conference rate by agreement, but individual carriers could be found in violation under the proposed language. Accordingly, we suggest that the language be amended to read as follows:

"(6) Continue to impose any surcharge after the circumstances leading to its imposition have been determined by the Federal Maritime Commission after hearing to have ceased to exist; however, this provision shall not apply to a carrier who is a member of a conference, unless such determination is made as to the conference-imposed surcharge."

(4) Self policing of nonconference carriers—neutral body

Section 5(c)(3) incorporates the present law's requirement for self-policing by conferences. It is equally important that non-conference operators competing with conferences have mandatory policing to see that they live up to the published tariff rates. Serious consideration should be given to a provision which would include mandatory policing of non-conference carriers by independent auditors or by a neutral body employed in the same trade by a conference. At a minimum, the Commission should be given discretionary authority to impose self-policing requirements on independent carriers.

In addition, section 5(c)(3) of the bill recognizes the need for effective policing of the obligations imposed by international conference agreements by requiring that all conferences engage the services of an "independent neutral body to police fully the obligations of the conference and its members". This "policing" necessarily involves the right of the independent policing agency to inspect and copy (without the use of formal process) documents and records kept by foreign ocean carriers in foreign countries. The willingness of many ocean carriers (and foreign countries) to permit this type of inspection for the purposes of U.S. regulation is dependent upon assurances that the information received will be kept absolutely confidential by the neutral body. If this confidentiality cannot be guaranteed, we believe that the neutral body policing system will be unable to operate effectively in monitoring compliance with conference agreements. The whole idea of a "self-policing" agency is that it can perform functions that cannot be performed directly by governmental authority because it can obtain documents that would, under foreign law, be inaccessible to the Federal Maritime Commission or other U.S. governmental authorities. If neutral body self-policing agencies could be forced to turn over such records to the FMC pursuant to a subpoena or discovery request, this advantage would be lost, since ocean carriers and foreign governments might well be unwilling to cooperate with neutral bodies under such circumstances. We believe, therefore, that it is essential for the Bill to permit neutral bodies to guarantee the absolute confidentiality of their files. To effect this end, we propose that section 14(a) be amended by adding the following:

"(3) [T]he Commission shall not require disclosure of records kept by independent neutral body self-policing agencies engaged pursuant to section 5(c)(3) of this Act."

(5) Retroactive application

Because the Bill would create a "new" Shipping Act with somewhat different standards for judging carrier compliance with its provisions, the conferences are concerned that certain of the prohibited acts listed in section 12(a) will be applied retroactively. This is especially troublesome in the case of sections 12(a)(4) and (6), but still troublesome as to the other sections which state currently unlawful activities in somewhat different terms. Further, because section 13 enlarges the category of persons who may file complaints and section 14 enlarges the availability of discovery, carriers will be even more vulnerable while at the same time subject to stiffer penalties for violations.

We feel it important, therefore, that it be made clear that pre-1981 Act activities be judged under standards of the 1916 Act, while post 1981 Act activities should be subject only to the provisions of the 1981 Act, and that the 1981 Act's standards and penalties not be applied retroactively.

(6) Shippers councils—technical points

The definition of "shippers council" in section 3(18) should be made consistent with section 4(c) by incorporating into the definition in section 3(18) the words "organized or existing under the laws of the United States". Section 4(c) should probably delete the vague words "negotiate with" since such words imply but fall short of reaching "agreement" which is not permitted. "Consultation" is sufficient and more accurate3y describes what we perceive to be the intent of the draftsmen.

(7) Burden of proof

The Administrative Procedures Act places the burden of proof on the proponent of an order. The Commission has often misapplied this requirement, especially in cases accusing regulated carriers of statutory violations. Especially in view of the large new penalties in the Bill, section 13, for purposes of clarification, should provide that in all proceedings thereunder the burden of proof shall be on the proponent of any order which would find a violation of the Act.

(8) Elimination of tariff filing

Finally, it is our understanding that proposals may be made to eliminate the requirement that carriers file and adhere to any effective regulation of carrier rates and practices. A proposal to end the tariff filing requirement would effectively destroy the protections provided to shippers and carriers alike in many other sections of the Bill. For instance, if tariffs need not be filed and followed, carriers would be free to charge each shipper different rates fluctuating from day to day. The prohibitions against rebating to shippers, or discriminating between shippers, contained in section 12 of the Bill would become a dead letter, since it would be virtually impossible to determine whether the charge imposed by the carrier was equally available to all shippers. Similarly, the provision in section 7, authorizing loyalty contracts, would become very difficult to administer. If the shipper is unaware of what the tariff rates are, he is in no position to evaluate whether he would benefit from a commitment to ship exclusively with one conference (or carrier) in exchange for a stated discount. From the carriers' standpoint, the removal of the tariff filing requirement is extremely undesirable because it becomes extremely difficult to identify and meet competition. Attempts to verify rates competitors are charging by direct inquiries to competitors would lead to violations of section 5(a). Secret pricing would have an extremely destabilizing influence on rates, resulting in violatility that is harmful both to carriers and to shippers who need to plan their transportation costs. For these reasons, it is our strong position that the tariff filing requirement should be retained.

CONCLUSION

We thank you for allowing us to present the views and concerns of our Conferences and their membership, and believe that this statement will prove useful to the Committee in finalizing the language of the new Shipping Act. None of the suggestions and comments in this statement are lightly made, and our conference memberships consider each of them to be essential in making a good Bill even better.

STATEMENT OF FRANK DROZAK, PRESIDENT, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Mr. Chairman and Members of the Subcommittee, my name is Frank Drozak. I am the President of the Seafarers International Union of North America, AFL-CIO, which represents unlicensed seamen on U.S.-flag vessels. The Seafarers International Union appreciates the opportunity to express our views on the proposed bills which would ease the regulatory environment which presently exists in the world of international ocean shipping.

Both S. 125, the Ocean Shipping Act of 1981, and S. 1593, the Shipping Act of 1981, propose much needed reform in this area. We commend the Subcommittee for its continued efforts to improve and strengthen the United States-flag merchant fleet. All of us in the maritime community have expressed great concern over the continuing decline of our merchant marine. At present, the U.S.-flag fleet carries less than four percent of our Nation's foreign commerce. Legislation, such as that presently before the Committee, is vital if we are to reverse this disheartening trend.

The Seafarers International Union supports legislative and regulatory initiatives which will promote a viable United States-flag merchant fleet crewed by American seamen. We support the intent of S. 125 and S. 1593 which would greatly improve the regulation of international ocean shipping and consequently contribute to a stronger, more competitive U.S.-flag merchant marine. Our comments will be kept general in nature and we will leave detailed comments to those segments of the industry more directly involved with the Federal Maritime Commission and maritime regulation.

The Seafarers International Union fully supports the concept of antitrust immunity for conference agreements and activities in international ocean shipping. Our carriers are currently disadvantaged by the extraterritorial application of U.S. antitrust laws. No other nation in the world imposes such a tremendous burden on its operators and U.S.-flag companies are seriously handicapped with respect to their foreign counterparts. The original 1916 Shipping Act sought to provide such immunity; however, repeated intervention by the Justice Department has since forced U.S. operators to comply with the antitrust statutes which has contributed to the decline of our U.S.-flag merchant marine.

Another important area which these bills address is the conference system. As it exists today, the conference system does not provide an effective body for the efficient carriage of our international trade. Changes must be forthcoming in the current system which will allow operators to work together for their mutual benefit.

Although the Committee has made it understood that it would not include any "promotional" provisions in a regulatory bill, we feel that this is an important area which must be addressed. We are in strong support of the bilateral approach to a stronger merchant fleet. We feel that any legislation designed to promote the United States merchant marine should provide for bilateral shipping agreements which are negotiated with the aid of an industry advisory committee with adequate labor representation.

The Seafarers International Union thanks you for the opportunity to express our views on these significant legislative proposals. However, because these draft bills deal primarily with the regulatory aspects of United States maritime policy, the Seafarers International Union respectfully urges the Subcommittee to address the promotional aspects as soon as is convenient. We will be pleased to provide any further assistance to you or your staff.

Thank you.

STATEMENT OF ALFRED MASKIN, EXECUTIVE DIRECTOR, AMERICAN MARITIME ASSOCIATION

Mr. Chairman and Members of the Subcommittee, the American Maritime Association consists of 33 companies operating 116 American-flag merchant ships in the foreign and domestic commerce of the United States.

Of these 116 ships, approximately two-thirds are liner vessels which would significantly be affected by enactment of the legislation the Subcommittee now is considering.

The American Maritime Association supports the intent of both bills the Subcommittee has before it—S. 1593, introduced on August 3rd by Mr. Gorton, the chairman of the Subcommittee, and S. 125, introduced on January 15th by Mr. Inouye, the ranking minority member.

These bills differ in some specifics. But both seek to enhance the climate for U.S. international trade by updating and improving the regulatory mechanism governing such trade, and by promoting practices of individual carriers and combinations thereof which will fit their own needs and those of the shipping public.

Moreover, although our international commerce is served by both U.S. and foreign-flag carriers, and although the legislation will benefit foreign-flag as well as U.S. vessels, various provisions of the legislation will be of special assistance to U.S. operators in enabling them to compete more effectively with their foreign-flag counterparts for the carriage of our own cargoes, and in stimulating the revitalization of the American-flag liner fleet.

These results the legislation seeks to achieve principally by strengthening the antitrust immunity of conference activities and by reestablishing the primacy of the Shipping Act of 1916 with respect to these activities.

Such actions, as Senator Gorton noted in introducing his bill, would not only foster stability in our foreign commerce, but would be consistent with international shipping practice, would remove a constant irritant between the United States and its trading partners, and would restore the view that agreements for economic cooperation among common carriers should be subject exclusively to the Shipping Act and not to the antitrust laws.

Even more important than the intrinsic merit of the bills' antitrust provisions, however, is the fact that they would at long last end the erosion of Congress's original intent by the Justice Department and the courts, and dispel the uncertainty under which liner companies have had to operate, to the particular detriment of U.S.-flag liners which have had the greatest exposure and vulnerability in this regard.

With respect to specific features of the legislation, and again viewing these principally from the standpoint of U.S.-flag operators, we strongly would support those provisions which would promote the rationalization of liner services, and which not only would permit liner companies concurrently to reduce costs while improving efficiency but enable U.S.-flag liner companies to do what their foreign-flag competitors have been doing for many years.

Again, we strongly would favor those provisions of the legislation which would allow conferences as well as individual carriers to establish through intermodal rates, and to have intermodal tariffs subject to regulation by a single agency, the FMC.

Under existing conditions, the ocean liner industry—and thus the shipping public—has been able to take full advantage of the benefits of intermodalism. On the contrary, the doubts surrounding the validity of intermodal arrangements have had a number of deleterious effects, including, as Senator Gorton has pointed out, the increasing diversion of cargo from and to the United States through Canadian ports by foreign-flag carriers.

Enactment of the legislation the Subcommittee now is considering would be of immeasurable benefit to the liner vessels operated by AMA members, and we would urge the Subcommittee's approval.

STATEMENT OF THE NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, INC.

BASIC POSITION

This position paper details the views of the National Association of Beverage Importers, Inc. (hereinafter, NABI) on two basic issues raised by S. 1593:

1. Closed Conferences
2. Shippers Councils

NABI expresses its support for the concept of Shippers Councils, with certain modifications, and its opposition to closed conferences.

THE NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS

NABI is the national trade association for importers of wine, spirits and beer. Its members import products from many countries throughout the world, but the heaviest volume of imports is from the European area. NABI members support U.S.-flag carriers; and excluding carriage of goods through the Great Lakes, which is not served by U.S. carriers, over one third of the tonnage of beverage alcohol imports is carried by U.S.-flag vessels.

NABI members, as well as other beverage alcohol importers, ship primarily with the carrier members of the North Atlantic Westbound Freight Association, the Continental North Atlantic Westbound Freight Association, WINAC, and the Iberian Conference. To give some index of the volume of imports involved, shipments of wines and spirits from the United Kingdom to the United States constitute the largest commodity class both in tonnage and in dollar volume.

For many years, importers of beverage alcohol products have been dissatisfied with the unilaterally dictated freight rates. These present freight rates for the carriage of wine and spirits from the United Kingdom to North and South Atlantic ports, contain a large subsidy for other, lower valued items.

These high freight rates exist in spite of a volume of nearly 50 million gallons of spirits imported from the United Kingdom. Coupled with brandy, gin and cordial importations from Common Market countries, the volume is over 65 million gallons. This is the equivalent of over 27 million cases of spirits in 750 milliliter bottles. Such shipments in containers would fill over 27,000 40-foot containers. Adding shipments of Common Market wines to this figure, there would be approximately 38 million cases of wine which would equal about 40,000 containers, if imported in the 750 milliliter size. This would equal a total yearly container entry into the United States of spirits and wine of 67,000 containers. It would mean shipments of over 186 containers of imported wines and spirits into the United States each and every day of the year, including Saturdays and Sundays.

In spite of this tremendous volume of wine and spirits—not to mention 34 million cases of beer imports—the wine and spirits importers have been unable to effectively negotiate for reasonable rates for the simple reason that they have been negotiating as individuals, and not as a group.

BACKGROUND

Once again the Senate, by way of S. 1593, as well as the House of Representatives, through H.R. 4374, have begun hearings on shipping policy. The Senate vehicle for present consideration of shipping problems is S. 1593, which has for its purpose "to revise regulation of international liner shipping operating in the United States foreign commerce." This appears to be a continuing effort which goes back to at least 1977, when both the House and Senate looked at broad issues involving shipping policy. Public Law 95-843 strengthened certain provisions of the Shipping Act of 1916, in regulating the rate-cutting practices of state-controlled carriers operating as "cross traders" in the international liner trade. Another piece of legislation, Public Law 96-25, strengthened the provisions of the Shipping Act of 1916 which prohibits illegal rebating.

The interests of NABI members is most direct in connection with this continuing effort in both the Senate and the House to deal with conference authorities, intermodal activities, and shippers councils. It is regrettable that S. 1593 reverts to a protectionist posture which is in many respects opposed to the Senate passed Ocean Shipping Act of 1980 (S. 2585). This Bill, which was the subject of extensive hearings and testimony from over 70 witnesses, was in many respects more balanced than the present S. 1593. It appears significant that Sea-Land, a U.S.-flag carrier, supported S. 2585 in respect to seven points embodied therein.

1. Retention of open conferences in the U.S. trade;
2. Strengthening of FMC regulatory jurisdiction over all Section 15 activity;
3. Mandatory independent neutral body policing against malpractices apply to all liner carriers in U.S. trades, including independent carriers;
4. Expedited FMC regulatory proceedings;
5. Anti-trust exemption for shippers councils, to permit collective shipper-carrier communications;
6. Extending Shipping Act authority to confirm liner conference ability to address intermodal rates;
7. Creation of a basic U.S. policy of "responsive bilateral liner shipping agreements" to apply in circumstances where a foreign government discriminates against U.S. shipping and demands an agreement from the United States.

Most of the balance and perspective of S. 2585 is missing in S. 1593. We are prompted to pose a somewhat rhetorical question as to why it is necessary for both the Senate and the House to take a basically different tack on shipping problems at this session. More important, why is it once again necessary for the Senate and House to proceed on shipping problems with what would appear to the outsider as no apparent communication between these two learned bodies?

SPECIFIC OBJECTIONS

1. Closed conferences

Sec. 4(a) of the Bill, under the caption "Authorized Activities," specifies that ocean common carriers may agree on the following:

(1) discuss, fix, regulate, and agree upon rates, surcharges, accommodations and other conditions of services;

(2) pool or apportion earnings, losses, or traffic;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements;

(6) enter into other agreements to control, regulate or prevent competition among themselves; and

(7) limit, in the case of conferences, membership.

It might be pointed out that in spite of recent Justice Department relaxation of anti-trust action levels, Chapter 13 of the report of the National Commission for the Review of the Anti-Trust Laws recommended, admittedly in the last Administration, that "absent overriding diplomatic or national defense requirements, anti-trust immunity should not be extended to any ocean shipping conference agreement that (1) does not permit a right of independent action; (2) permits dual rate contracts; (3) permits rate setting agreements with independent carriers; (4) permits pooling agreements." While NABI, and many other associations and groupings of shippers, takes strong exception to the criticism of dual rate contracts, it would urge that the Senate give weight to the Anti-Trust Report of 1979 in regard to the other matters, most particularly the strong criticism of pooling agreements.

The only clearly fair provision under Sec. 4(a) is paragraph (1), which allows the carriers to regulate rates and surcharges. As indicated above, there is a weight of authority against pooling of earnings, losses and traffic in the shipping industry. It likewise appears that every other paragraph in Sec 4 is anti-competitive—(3) allows port allocation and the rationalization of sailing—(5) would allow exclusive or cooperative working arrangements, and (6), the catchall, would allow "other agreements to control, regulate or prevent competition . . ." All this, when viewed from the perspective of the closed conference, goes beyond the laudable purpose of carrier protection to the ultimate in attempting to legalize anti-competitive action.

In summary, Sec. 4 of the Bill is so discriminatory against the community of shippers that with this Section the entire Bill must be vigorously opposed.

2. Shippers' councils

Should there be a more moderate approach taken to the rewrite of Sec. 4(a), the NABI would urge that shippers' councils, with expanded scope and authority, be legalized. In this connection, attention is directed to testimony before the Committee on September 23, 1981. The U.S. Council of the International Chamber of Commerce has addressed the issue of shippers' councils most succinctly as follows:

"The Bill would provide authority to established shippers' councils with extensive authority, but this does not adequately address how shippers' councils would be structured. We are fearful that the notion of shippers' councils is primarily being used here in hopes of a counterbalance to closed conferences, thus legitimating the latter. However, as we have seen little evidence of shippers' councils outside the United States being able to truly counterbalance closed conferences, and we would caution against the assumption that establishing shippers' councils will, with anti-trust immunity, automatically constitute an effective equalizing force."

Buttressing this appraisement of the power of shipping councils was the statement by Mr. J. F. Muheim on behalf of the standing Committee on European National Shippers' Councils:

"We have practically given up to consult with the respective conferences, because it is more or less just not a consultation as we understand it, just a listen-and-report activity, without proper commercial reaction by the conferences."

NABI fully agrees with the foregoing appraisals. If there are to be shipping councils, these must be so organized as to be able to negotiate effectively with the carriers.

The reason for underscoring the volume of traffic controlled by beveage alcohol importers on pages one and two of this position paper is the fact that in spite of this volume, the importers neither collectively or individually have been able to negotiate reasonable rates with the carriers. There is a current and urgent necessity for beverage alcohol importers to be authorized to negotiate with the carriers on a commodity basis, through the authorization of Shippers' Councils, which would grant shippers and importers and anti-trust exemption for such negotiations. Beverage alcohol products, and most particularly wine and spirits, are high value commodities, and the carriers, rightly or wrongly, have been charging a high rate for the carriage of these goods, based upon their value. The profitability on this heavily tonnaged commodity provides revenues to the carriers so that lower rates may be charged for other lower valued commodities. It is only fair that the importers of beverage alcohol products be allowed to meet with the carriers and carry on bona fide negotiations, dealing with their own particular freight rates, rather than with freight rates in general.

Under the circumstances, a "broadly based" Shippers' Council which covers a broad range of commodities would be of no use to the importers of beverage alcohol products, since importers' interests in the specific freight rates would be lost in the discussions on overall rate structure.

Unlike the current House proposal for a Shippers' Council, in H.R. 4374, this Senate Bill appears to pave the way for approval of Shippers' Councils. The Chairman of the Federal Maritime Commission, on page nine of a September 21, 1981 Communication to the Committee, expresses this view in a short statement: "Subsection (1) implies that shippers' councils must be *established by commodity groups*" (emphasis supplied).

Accordingly, NABI generally supports the text of the proposals for shippers' councils and their exemption from the anti-trust laws. However, the Congressional intent of authorizing commodity-by-commodity shippers' councils should be spelled out in the Senate report on the Bill.

STATEMENT OF NATIONAL MARITIME COUNCIL

Mr. Chairman and members of the Subcommittee, the National Maritime Council appreciates this opportunity to present its views on S. 1593, the Shipping Act of 1981, and S. 125, the Ocean Shipping Act of 1981. Both measures would rewrite and update the basic law which regulates the ocean liner transportation business in the United States trades, namely, the Shipping Act, 1916.

The NMC is a nonprofit trade association which represents virtually all segments of the American maritime industry. The position of the Council on this legislation was agreed upon by the senior executives of all NMC member U.S.-flag liner and bulk carriers, seagoing and shoreside labor unions and major shipyards. The Council's objective is to foster the development of a strong, competitive, modern, American-built, privately-owned and operated U.S.-flag merchant marine which will afford United States exporters and importers the finest and most cost-efficient fleet of commercial vessels in the world.

It is readily apparent that you, Mr. Chairman, and your colleagues, Senators Stevens, Kasten and Inouye, share the Council's objective. This is evidenced by your introduction of such a far-reaching and positive initiative as S. 1593, the Shipping Act of 1981, and by Senator Inouye's bill, S. 125. Enactment of these measures would greatly improve United States regulation of the ocean liner shipping industry, streamline and modernize the regulatory process, and reduce undue regulatory burdens on the U.S.-flag liner industry. These changes would benefit not only the carriers, but the users of international transportation services as well.

BACKGROUND

In the two years immediately prior to World War I, the Committee on the Merchant Marine and Fisheries of the House of Representatives conducted an in-depth investigation of the liner shipping industry operating in the foreign commerce of the United States. It found that the industry was unique in a number of respects. The U.S. foreign trades were served by many foreign-owned companies as well as U.S. operators, and U.S. imports and exports were also the imports and exports of many foreign nations with equal interests in that commerce. The ocean liner industry was capital intensive, which led individual lines to attempt to fill their vessels through intense price competition which, if not controlled, would result in excessive and destructive competitive practices. The rest of the world had solved this problem through a system of conferences of steamship lines in the major trade routes which jointly fixed rates and conditions of service in the trade. The committee found that the conference system could not operate legally in U.S. trades without express immunity from the application of the antitrust laws of the United States.

In its report issued in 1914, the committee concluded: ". . . that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results; the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cut-throat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

The Alexander Committee report recognized that some degree of immunity from the antitrust laws should be granted to liner operators in our foreign commerce, but recommended that certain disadvantages and abuses of the conference system be eliminated by effective government regulatory control. As a result of this investigation, Congress enacted the Shipping Act, 1916, which, with certain modifications, continues to be the statutory basis for regulation of the ocean liner shipping industry in U.S. foreign trades.

Both the legislative history and plain meaning of section 15 of the Shipping Act, 1916, which confers a limited antitrust exemption to carriers and conferences, indicate that the statutory standards of that Act were intended to supersede the standards of the antitrust laws in liner shipping matters. This doctrine of exclusive primary jurisdiction was generally accepted for four decades. It was affirmed by the U.S. Supreme Court in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), and again in *Far East Conference* v. *United States*, 342 U.S. 570 (1952). These cases and others clearly held that the antitrust laws were inapplicable to agreements of shipping lines and conferences within the purview of the Shipping Act, 1916, whether approved or not. They established that the remedies for violations of section 15 were to be found solely within the four corners of that Act.

In addition, for this period of time, the standards for approval or disapproval of agreements had been commercial rather than antitrust standards. Indeed, there was a presumption in favor of approval of the types of agreements not prohibited by the Act. However, in 1954, the courts began to undermine the doctrine of exclusive primary jurisdiction and inject antitrust principles into liner shipping matters. In *Isbrandtsen Co., Inc.* v. *United States*, 211 F.2d 51 (D.C. Cir. 1954), the court stated that the Federal Maritime Board, in considering approval of an agreement, must ". . . scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute."

The most important case which squarely injected antitrust principles into liner shipping matters was *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). In this case, the Supreme Court reversed two lower court decisions and overturned 50 years of precedent. The court held that there had been no congressional intent to grant the shipping industry complete antitrust immunity and, therefore, the implementation of ratemaking agreements that had not ben approved by the Federal Maritime Commission was subject to the antitrust laws. Liner carriers and conferences suddenly found themselves exposed to the antitrust laws if they acted in a manner later found to be beyond the scope of their approved agreements. The liner shipping industry became potentially liable to treble damages and criminal penalties under the antitrust laws as well as reparations and civil penalties under the Shipping Act, 1916.

Shortly thereafter, the courts further extended antitrust standards to liner shipping matters. In *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F. Supp. 949 (S.D.N.Y. 1968), cert. denied 395 U.S. 922, the district court held that even though the conference lines were operating pursuant to approved agreements, the rates fixed were so low as to be detrimental to commerce. This constituted a violation of section 18(b)(5) of the Shipping Act, 1916, and therefore, was beyond the scope of any approved agreement. The rates found unlawful were retroactively devoid of antitrust immunity, and a treble damage suit could be brought by an injured party.

In *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), the Supreme Court held that an agreement that interferes with the policies of the antitrust laws could be approved only if the proponents could factually demonstrate that the agreement is "required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act." This requirement imposes an affirmative burden on the proponents of an agreement. It also continued the process of substituting antitrust standards in judging approvability of agreements.

Two other decisions, one judicial and the other administrative, have further eroded the presumption of approvability of section 15 agreements. These two cases have virtually completed the process of replacing commercial standards for approvability with antitrust standards. In *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577 (D.C. Cir. 1969), the Court of Appeals held that some type of hearing was necessary in virtually all instances where an agreement raises significant antitrust questions or when an agreement is protested. The Federal Maritime Commission itself, as demonstrated in *Canadian American Working Arrangement/Canadian American Discussion Agreement*, 16 S.R.R. 773 (1976) (CAWA/CADA) has firmly followed the lead of the courts in its administrative handling of section 15 agreements. In that decision it meticulously restated the *Svenska* antitrust standards for approval. The Commission said that "the burden of going forward with the evidence, that is the burden of adducing evidence which shows the need for the agreement, is on the proponents of the agreement." This was virtually the end of the original presumption in favor of approval of section 15 agreements.

These court decisions, beginning in the 1950s, together with the ensuing administrative practices of the Commission, have resulted in almost total erosion of the original intent of Congress when it enacted the Shipping Act, 1916. Antitrust immunity and the doctrine of primacy of the Shipping Act, 1916, over the antitrust laws has been lost. Industry practices which previously would have been within the scope of approved agreement, or if in violation of section 15 would have been subject to the penalty provisions of the Act, are now additionally subject to retroactive antitrust treble damage suits and criminal penalties. Carriers and conferences are unable to predict with any degree of certainty what actions might later be found to be in violation of the antitrust laws.

S. 1593 AND S. 125

S. 1593, the Shipping Act of 1981, and S. 125, the Ocean Shipping Act of 1981, represent the culmination of many years of effort by the Committees having jurisdiction over maritime affairs in Congress. Many of the concepts contained in the legislation were originally raised and examined in depth during this Subcommittee's consideration of S. 2585, a bill which Senator Inouye skillfully guided through the Senate in the 95th Congress. That measure sought to modernize the regulatory process with respect to ocean liner shipping and to harmonize to the greatest extent practicable U.S. regulatory practice with that of our major trading partners.

S. 1593 and S. 125 are premised on the valid assumption that the statutory scheme embodied in the Shipping Act, 116, which was formulated in response to problems encountered in our ocean liner trades before World War I, is woefully inadequate today. It recognizes that such phenomena as intermodalism, containerization, state-controlled fleets, the aspirations of less developed countries to have merchant fleets, and cargo sharing arrangements by multilateral or bilateral measures, were not even dreamed of when the Shipping Act, 1916, was enacted. Both measures also recognize that a new statutory framework, establishing a new regulatory philosophy, is needed to alow U.S.-flag carriers and shippers to conduct international trade in a stable, efficient and fair manner, and places a new emphasis on harmonizing United States policies and practices with those of our trading partners.

These objectives are of paramount importance in light of our staggering balance-of-trade deficit, which was in excess of $29 billion in calendar year 1980. Another such deficit is predicted by most international economists for this year.

The drafters of S. 1593 and S. 125 recognize that American-flag carriers are totally exposed to all U.S. laws and regulations pertaining to liner shipping, including the full brunt of unexportable domestic antitrust policies, and that foreign carriers are in an advantageous position to generally evade the thrust of those same U.S. laws and regulations. Their exposure is limited by the locus of records and documentation overseas, beyond the reach of subpoena and Federal Maritime Commission section 21 orders, and by "blocking statutes" erected by the governments of our major trading partners who do not share our antitrust philosophy.

These blocking statutes prohibit the production of evidence or testimony by witnesses pursuant to subpoenas issued by the Federal Maritime Commission. Twelve countries have passed such statutes, all of which were in direct response to U.S. attempts to enforce our antitrust philosophy or regulatory shipping laws, or to otherwise obtain information with regard to violations of law. These nations are the U.S.S.R., Sweden, Norway, Denmark, Federal Republic of Germany, the Netherlands, Belgium, Great Britain, France, Spain, Greece and Japan.

The existence of these blocking statutes is positive evidence that the United States cannot effectively or fairly export its antitrust philosophy. Indeed, an editorial in the Washington Post, entitled "Antitrust: the New Imperialism," commented on the efforts of the United States to regulate the economic activities of foreign corporations as well as American companies abroad, and stated the "American antitrust law does not travel well." The Post concluded:

"Americans have worked out their rules of competition at home, and are now trying to extend them into international commerce as sort of an afterthought. But to most Europeans and Canadians, competition mainly means international competition, with industry at home organized above all to meet the pressures of that unforgiving environment. The Sherman Antitrust Act is not a suitable instrument for the regulation of world trade. Maintaining international competition is the proper business of diplomats and negotiation, not federal judges and litigation."

In summary, U.S.-flag carriers, which continue to be subject to our laws while their foreign competitors are not, are unjustly discriminated against by our own laws and regulations. Moreover, some nations have retaliated against the U.S. shipping policy and the application of our antitrust laws to their nationals by imposing countervailing measures. For instance, the British government has recently enacted a law entitled "Protection of Trading Interests Act, 1980." That Act provides that the British Secretary of State may direct any person in the U.K. not to comply with another country's laws insofar as they attempt to regulate actions outside of the other country to the detriment of British trading interests. It also authorizes the Secretary to prohibit compliance with foreign court orders that encroach upon the jurisdiction of the United Kingdom. The law also prohibits a British court from enforcing certain multiple damage awards (including treble damages) against U.K. citizens, and permits them to recover the part of such multiple damage awards which exceeds actual compensation. Her Majesty's government has made it crystal clear that this legislation was aimed directly at the extraterritorial reach of U.S. antitrust laws in general, and U.S. shipping regulation in particular.

"The inescapable conclusion is that within the past eleven years the regulatory scheme governing the shipping industry has turned 180 degrees. The antitrust exemption of the 1916 Act now resembles Swiss cheese—the holes are many, large and cannot be filled absent legislation. From a blanket antitrust exemption generally recognized and accepted in 1916, the industry now finds itself subject to regulation under the antitrust laws (including criminal penalties) and the Shipping Act. Whether Congress intended ocean carriers to be regulated in this dual fashion is academic. This is the situation which exists today. But whether this is wise or salutary is far from academic. The issue, an economic policy question pregnant with foreign relations considerations, can only be appropriately addressed by Congress."

We are pleased that S. 1593 and S. 125 address these problems by streamlining the procedure for approving agreements and reassert the presumption in favor of their approval. The bills also recognize that conference agreements must not only be effectuated with dispatch, while providing an opportunity for opponents to be heard, but the conference mechanism must be strengthened if it is to achieve its most important purpose—bringing stability, predictability and profitability to U.S. liner trades—thus best serving the foreign commerce of the United States. S. 1593, therefore, acknowledges that conferences need to limit membership based on commercially reasonable criteria and that more effective and flexible loyalty contracts with shippers and consignees are necessary. A closed conference system is consistent with the practice throughout the rest of the world, where such conferences are the rule. The ability to limit conference membership is most significant because the unique "open conference" structure which is legally required for the U.S. liner trades is a golden invitation for carriers of other nations to "dump" their excess tonnage in our trades. This results in underutilization of high fixed cost assets, which in turn, leads to higher freight rates for U.S. export and import commodities in international trade.

The framers of S. 1593 note that the primary cause of the economic instability affecting the U.S.-flag liner industry is the over-tonnaging in U.S. trades created by the dumping of excess capacity into our trades. The bill is designed expressly to limit over-tonnaging by authorizing conferences to engage in full rationalization of their services. There is practically universal support for rationalization of steamship services.

Finally, both bills provide for more effective communication between carriers and shippers by authorizing shippers' councils and immunizing their activities from the antitrust laws. We see an enormous need for the process of consultation which underlies the shippers' council concept because of the multitude of interrelationships between shippers and carriers. The relations between these two parties can be harmed by the inadvertent failure of one side to be properly responsive to the other's need. For purely pragmatic reasons, the principle of collective shipper-carrier consultation has evolved and has been adopted virtually throughout the world. It would appear that the shippers' council concept represents an improvement over the kind of customer relations that once characterized the shipping business.

MAJOR PROVISIONS

A. Reaffirm the antitrust immunity and primacy of the Shipping Act, 1916, over the antitrust laws

Section 8 of S. 1593 unequivocally states that "[t]he antitrust laws shall not apply" to certain activities which are clearly defined in various sections of the bill. These include:

A. Under paragraph (1), conference rate-fixing, other traditional conference activities, intermodal activities, and shippers' council activities as set forth in section 4.

B. Under paragraph (2), the use of loyalty contracts as defined in section 7.

C. Under paragraph (3), activities relating to transportation services between foreign countries.

D. Under paragraph (4), shippers' council activities operating outside the United States.

E. Under paragraph (5), activities to furnish wharfage, dock, warehouse, or other terminal facilities outside the United States.

Section 316 of S. 125 also clarifies and extends the antitrust exemption to certain agreements for concerted activities as well as the activities described in such agreements.

This section, in your words, Mr. Chairman, is the core of the legislation. Enactment of it will reverse the erosion of the antitrust immunity which was intended by the Congress to be conferred by section 15 of the Shipping Act, 1916. This clear legislative mandate that the antitrust laws shall not apply to the activities enumerated will remove much of the uncertainty that currently surrounds consideration of section 15 agreements by the Federal Maritime Commission.

Approval of this provision will eliminate much of the personal, but not the economic, risks that now confront businessmen who involve themselves in section 15 activities. It will also eliminate any question as to the right of the Department of Justice to interfere in the international economic arena not suited to conformance with our domestic antitrust laws.

Despite this unequivocal grant of antitrust immunity which section 8 would extend to carriers, conferences and shippers' councils, the public interest will be fully protected. The parties are not given carte blanche authority to enter into any kind of agreements or engage in whatever activities they may desire. Indeed, the activities in which carriers, conferences, and shippers' councils may lawfully engage and, conversely, those in which they may not lawfully engage, are carefully delineated in the legislation.

First, no concerted activity may be engaged in by carriers, conferences, or shippers' councils unless they have satisfied the filing requirements set forth in section 5(b). Second, carriers, conferences, or shippers' councils may not engage in any concerted activity until after an agreement has been approved or modified by the FMC under section 6.

Third, neither carriers nor conferences may engage in any activity authorized by section 4(a) unless they meet the five requirements set forth in section 5(c), and section 5(d) contains precise requirements which must be met by shippers' councils before they may engage in any activity authorized by section 4(c). Finally, section 12(a) sets forth eleven specifically defined activities in which carriers and conferences are prohibited from engaging.

In summary, if any carrier, conference, or shippers' council should engage in activities beyond those specifically permitted by the bill, fail to meet the filing and agreement requirements of the legislation, or engage in activities prohibited by the bill, this would be a violation of the law and subject to the reparation provisions and civil penalty liabilities set forth in sections 13 and 15. In this regard it should be noted that these penalties have been significantly increased over those in the Shipping Act, 1916.

B. Expedited procedures for processing of agreements and reaffirmation of the presumption of approvability for Shipping Act agreements

Section 6(a) provides that any filed agreement which does not comply with the procedural requirements of section 5 shall be summarily rejected by the Commission. In addition, section 6(b) sets forth the statutory standards for the FMC to disapprove or modify agreements. Specifically, these are that the agreement is found to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; or to operate to the detriment of the commerce of the United States." Thus, the vague "public interest" test found in section 15 of the Shipping Act, 1916, is eliminated, and, of course, the unclear *Svenska* standard would have no application. This represents a positive step.

Other very important changes that section 6 makes in existing law are found in sections (c) and (e). Section 6(c) clearly states that the burden of proof in any Commission proceeding lies with the party opposing the agreement. Section 6(e) provides that the Commission must issue a final decision on any agreement within 180 days after filing. Today, while the Commission has made progress with regard to expediting its procedures, an improvement for which it is to be commended, a similar agreement filed with the Commission pursuant to section 15 might not be approved for many months or perhaps even years. More importantly, under these new procedures, resolution of questions regarding approval will be expeditiously resolved, even if the agreement were protested.

These new provisions present concerned parties with an opportunity to have questions regarding the approvablity of agreements decided promptly with substantial savings in time and money, and afford opponents an opportunity for a hearing on the merits of their position. Most importantly, they deter opponents of agreements from preventing approval merely by utilizing Commission procedures in lieu of actually litigating the merits of their case. Further, and this aspect is most important, these provisions would end the practice of agreements lapsing merely due to lack of final action by the Commission, for whatever reason, without any consideration on the merits.

The new procedures and standards reaffirm the presumption of approvability of agreements as originally intended by Congress in the Shipping Act, 1916. Again, however, the public interest has not been ignored. Despite expedited procedures and a presumption of approvability of agreements within the purview of the legislation, parties are not free to implement or obtain approval of any agreements they desire. Very clear and precise safeguards consistent with the public interest have been built into the requirements for approvability.

First, it would be a violation to implement an agreement not filed with the Commission or before it has become effective under the procedures of section 6, and any such concerted activity would be subject to the reparation and heavy penalty provisions of sections 13 and 15.

Second, before being permitted to become effective an agreement must meet the very stringent tests set forth with precision in sections 4, 5, and 7. Any agreement which violated any of these requirements would be subject to modification or disapproval after notice and hearing under the provisions of section 6. It is significant to note that the series of requirements which must be met before agreements can be lawfully implemented are those created by Congress itself. They will no longer be the broad "public interest" test of the Shipping Act, 1916.

Finally, the interests of other parties who might be adversely affected by activity under agreements filed with the Commission have been carefully protected. Other carriers, shippers or other parties subject to the legislation, which include forwarders, terminal operators, and ports, may file a complaint urging that the agreement would violate some provision of the bill, and requesting modification or disapproval of the agreement at a hearing required to be granted by the Commission.

C. Closed conferences in the U.S. trades

Section 5(c)(1) states that every conference must provide that any limitation on membership is based on "commercially reasonable criteria." This provision authorizes, for the first time, the closed conference system in the U.S. liner trades. In contrast, S. 125 retains the existing open conference system presently mandated by the Shipping Act, 1916.

Enactment of this provision is important if the United States is to combat the problem of over-tonnaging which is plaguing our liner trades. This provision, as we discussed earlier, will bring United States ocean shipping practices in line with those of the rest of the world. Thus, it would carry out one of the major policy objectives of the legislation, namely, "harmonize United States shipping practices with those of its major trading partners."

D. Establishment of shippers' councils

Section 4(c) authorizes the establishment of shippers' councils whose activities will be exempt from the antitrust laws under section 8. The activities in which such councils may engage are limited to mutual consultation and the exchanging of information or views regarding general rate levels, rules, practices, or services, and the consultation and negotiation with carriers and conferences with respect to general rate levels, rules, practices, or services.

The National Maritime Council believes that the establishment of shippers' councils in the U.S. trades is mainly an issue which the American shipping community must address. Moreover, we would not oppose a less formal mechanism that would improve communications between shippers and carriers. We believe that the American shipper should solve this problem in a positive and constructive manner.

E. Clarification of authority over intermodal agreements

Section 4(b) of S. 1593 permits carriers and conferences to enter into intermodal transportation agreements with air, motor, and rail carriers for the carriage of cargo under intermodal through rates. Section 8 would confer an appropriate antitrust immunity for such activities. Section 301(b) of S. 125 contains a similar provision.

The development of intermodal transportation has been a major breakthrough in improving service to shippers and receivers. It has sparked many changes in the delivery of ocean cargo by simplifying for the shipper and the consignee the process of through-movement of goods. Where a shipper or consignee previously may have been required to deal separately with an inland carrier, an ocean carrier, and another surface carrier under an intermodal rate, the shipper can be offered the simplicity of dealing with only one entity providing a house-to-house movement of a container from point-of-origin to point-of-destination. Unfortunately, however, the benefits of intermodalism have been frustrated by the uncertainty concerning ocean conferences' authority to jointly enter into intermodal agreements with truckers, railroads, and airlines or their respective rate bureaus.

Both bills will resolve this uncertainty by adding intermodal agreements between a water carrier or conference and associations of rail, motor, or air carriers to the categories of agreements currently in section 15 of the Shipping Act, 1916.

F. Require independent neutral body policing of all carriers serving U.S. trades

Under existing law, the Federal Maritime Commission is required to disapprove any section 15 agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. The effectiveness of this policing requirement has been subject to criticism over the years. In addition, the requirement only applies to conferences, not independent carriers. Section 5(c)(3) of S. 1593 more or less tracks existing law in that the policing requirement is limited to the obligations of the conference and its members.

In contrast, section 310 of S. 125 would require independent neutral body policing of all carriers serving a particular trade. Under that bill, the FMC is authorized to dispense with the policing requirement if it found that the cost of such policing would be unreasonably large in relation to the size of the trade. The National Maritime Council firmly believes that the independent neutral body policing requirement should be extended to all carriers, conference and nonconference alike, serving major U.S. liner trades.

G. Retention of tariff filing requirements

We note that both S. 1593 and S. 125 retain the requirement currently found in the Shipping Act, 1916, that ocean carriers and conferences file tariffs with the Federal Maritime Commission. We strongly support this provision because we believe it facilitates and fosters fair competition.

H. Deregulate freight forwarders

Section 11 of S. 1593 would remove the current licensing requirements for freight forwarders found in section 44 of the Shipping Act, 1916. We question the wisdom of such a sweeping provision. Likewise, the National Maritime Council understands that a number of forwarder associations have problems with this provision.

CONCLUSION

Mr. Chairman, and members of the Subcommittee, the National Maritime Council has, in this statement, focused on the major problems confronting the ocean liner industry and the provisions in S. 1593 and S. 125 that seek to address these problems.

On balance, the NMC earnestly believes that S. 1593 represents a far-reaching effort to streamline and modernize the regulation of the United States ocean liner foreign commerce. We believe that the legislation will enable the U.S.-flag liner fleet to compete more effectively in the world of international shipping and harmonize our laws—above all our antitrust laws—to the fullest extent practicable with those of our trading partners.

This legislation offers, from our perspective, a reasonable, responsible, and realistic solution to the major regulatory problems confronting U.S.-flag liner operators today.

Thank you.

STATEMENT OF NATIONAL ASSOCIATION OF STEVEDORES

Many of the member companies of the National Association of Stevedores (NAS) operate marine terminals throughout the seacoasts of the United States as well as in Hawaii, Alaska and Puerto Rico. Being providers of terminal facilities, either under lease arrangements or outright ownership, marine terminal operators are "other persons subject" to the Shipping Act, 1916, as that term is defined in sec. 1 (46 USC § 801).

The present sections of the Act which apply to marine terminal operators are: (1) sec. 15 concerning approval of agreements; (2) sec. 16 and 17 concerning discrimination, practices, etc.; secs. 21–27; and 29–30 as to procedures, hearings, etc.

Sec. 3(13) of S. 1593 contains the same definition of "other person subject to this Act" as is now in sec. 1 of the Act. Thus, as we understand S. 1182 there will be two definitions of "other persons", albeit identical. Sec. 4 of S. 1593 states authorized activities of "other persons" subject to approval under the provisions of secs. 5 and 6. Sec. 12(c) sets forth activities which shall be unlawful if committed by "other persons". As we understand sec. 19(b) of S. 1593, the preceding sections of S. 1593 will apply to the operation of marine terminal operators ("other persons") in the foreign commerce of the United States while sections 15, 16 and 17 and the procedural sections 21-27 and 29-30 of the present Act will apply to the operation of marine terminal operators ("other persons") in the domestic commerce of the United States.

As marine terminal operators provide the same terminal facility and services to common carriers by water and shippers in both domestic and foreign commerce they would become subjected to two sets of regulatory laws simultaneously. S. 1593 provisions would govern their activities in the foreign commerce, while the unrepealed sections of the Shipping Act, 1916 would govern their activities in the domestic commerce.

The major problem caused is the conflict between sec. 15 of the Shipping Act and sec. 4, 5 and 6 of S. 1593 concerning agreements between "other persons" and their approval procedures. As to marine terminal facility leases between "other persons" such as the terminal operator and the terminal owner, such as a public port authority, giving the right to operate the terminal in the service of waterborne cargoes, both foreign and domestic, which law would apply. Or would the agreement have to be approved under both?

The deeper question is why should such agreements be subjected to any approval by the Federal Maritime Commission. The only justification under present law is that the language of sec. 15 as to cooperative working arrangement is broad enough to include marine terminal leases, as would sec. 4(a)(5) of S. 1593.

There is no rationale nor justification as to the reasons for requiring FMC approval of a lease of marine terminal property between "other persons" since that agreement is negotiated by parties not common carriers by water whose interest are to create a financially viable port operation to serve the foreign and domestic commerce of the United States. Having once so negotiated, it seems pointless to delay implementation of the lease agreement until the Federal Maritime Commission gives its approval of it. The disruption in financing and legal closing requirements caused by the unnecessary regulatory delay are not balanced by protecting any public interest, and have in fact delayed the proper movement of commerce.

The NAS believes that marine terminal lease agreements between "other persons subject to the Act", be it the Shipping Act, 1916 or S. 1593, should not require any approval by the Federal Maritime Commission. Accordingly, we urge this subcommittee to amend both to specifically provide that the term "agreement" (sec. 3(1) of S. 1593) and "cooperative working arrangement" in sec. 15 of the Shipping Act, do not include terminal lease agreements between "other persons subject to this Act".

Secs. 4-5 of S. 1593 present problems of interpretation in the area of agreements between "other persons"—terminal operators—to carry out the activities permitted in Sec. 4(a). For example, rate and tariff agreements between terminal operators is authorized by Sec. 4(a)(d), and there are many such agreements in effect today, authorized and approved by the FMC under sec. 15 of the Shipping Act. Those agreements will continue in legal effect pursuant to sec. 19(c) of S. 1593.

We assume that amendments to those agreements if related to foreign commerce are to be filed for approval under sec. 5 of S. 1593 and if related to domestic commerce under sec. 15 of the Shipping Act. We also assume that such agreements between terminal operators are not subject to the requirements of sec. 5(c) of S. 1593 as those agreements are not "Conference agreements" because of the definition of "conference" in sec. 3(6) of the bill. It appears that as to terminal operators, any agreement relating to conduct specified in sec. 4(a) must be approved by the Commission unless that agreement is in violation of sec. 6(b) of the bill, if the agreement pertains to foreign commerce. This appears to be the intent of the bill's author as none of the requirements of sec. 5(c) relate to activities of marine terminal operators, but are definitely aimed at conferences of ocean carriers.

S. 1593—Amend Sec. 3(1):

As used in this Act—

(1) "Agreement" means understandings, arrangements, and associations, written or oral, and any modification or cancellation thereof [;], *but shall not include understandings, arrangements, written or oral, pertaining to the use, lease or sale of marine terminal facilities between "other persons subject to this Act": or understandings, arrangements, written or oral pertaining to the furnishing of terminal facilities or services by "other person subject to this Act" and any common carrier.*

Sec. 15 Shipping Act, 1916 (46 USC § 814): Same insert at end of first paragraph of section 15.

STATEMENT OF J. L. PELUSO, JR., MANAGER, MARINE TRANSPORTATION, UNION CAMP CORP.

My name is J. L. Peluso, Jr. and I am Manager, Marine Transportation for Union Camp Corporation. In this capacity, I have overall responsibility for the movement of our products to their overseas markets. All manner of ocean transport is employed toward this end; namely, tank and dry van containers; breakbulk in conventional vessels, L.A.S.H. barges and deep-sea barges; liquid bulk in tankers, parcel tankers and conventional ship's deep tanks.

Union Camp Corporation is a major manufacturer of forest products. The products we market on a world-wide basis are kraft linerboard and sacking paper, corrugated and solid fibre boxes and both wood based and non-wood based chemicals. Our export sales amounted to $200 million in 1980 with the potential for steady growth in the future.

Our industry is intensely competitive and cost sensitive. The future of our export program will depend on, among others, our ability to compete effectively against formidable foreign suppliers under unstable market conditions.

Therefore, I offer the following recommendations regarding S. 1593:

INDEPENDENT ACTION

Member lines of the same conference should have the right of independent action instead of just in agreements between carriers not members of the same conference, etc., as provided for in Section 5(c)(4). This will provide conference member lines the means to be responsive and flexible when adjustments are necessary to react to constant changes in market demands/conditions. For example, when a conference in toto decides a particular rate proposal is not acceptable to the majority of the member lines, it is either declined or a counter proposal is offered at a level the conference deems acceptable. In any event, the customer requirement is not fulfilled generally resulting in lost business to the shipper and, in turn, lost revenue for the carrier(s) to whom the proposal was originally acceptable.

Lack of independent action can cause rate instability and undermine the conference concept when member lines continually experience business being lost or diverted due to "majority" decisions. They have no alternative but to withdraw from the conference. On the other hand, with the right of independent action, the carrier(s) could remain in the conference and in a controlled atmosphere adjust rates on an individual movement basis which, by virtue of conference denial, was not originally desirable to the majority. In addition, without independent action, a conference that lacks independent competition or adequate independent competition could conceivably prohibit shippers in a particular industry from conducting business by continually declining rate proposals and/or discriminate rate increases. This would not only be discriminatory, but also be considered monopolistic.

LOYALTY CONTRACTS

Section 7(a)(4) expounds the conditions which constitute a breach of contract by the shipper signatory. The last sentence expands this much further than the Shipping Act of 1916 by placing the burden of proof on the shipper.

This sentence should be omitted since it contradicts the basic foundation of our judicial system, i.e., innocent until proven guilty. It is neither fair nor reasonable to subject shippers to the costly and time consuming preparation for rebuttal when no proof of an infraction is required in the accusation.

The primary reason when cargo of a contract shipper is carried on non-conference vessels would be when the terms of sale are free along side vessel at the port of loading. The buyer then assumes responsibility, among others, to arrange for the ocean transportation. This is done at the buyer's insistence and generally becomes a condition of sale. We have many such customers and will probably have many more who insist their orders be shipped on their own vessels or by the carrier of their choice, regardless of that carrier's conference affiliation. We must always be in a position to react to our customer's requirements expeditiously and in a decisive manner if we expect to continue successfully marketing our products.

If the burden of proof is reversed to the shipper, then I urge the subcommittee to consider revising Section 7(a)(7) to allow shippers to terminate on not less than 30 days notice. Section 7(a)(2) should also be broadened to allow release from the contract for reasons other than just space availability. One example would be immediate release if a conference fails to respond to a shipper's request after a reasonable period of time.

CLOSED CONFERENCE

Section 4(a)(7) authorizes the limitation of conference membership or, in other words, authorizes closed conferences. The open conference system has encouraged competition, provided carriers with the ability to freely obtain membership in a conference when that is in their own best interest and provides incentive for continued innovation. These and other advantages have served U.S. shippers and all conference member lines well and should be continued. Member lines of a conference should not be given the virtual right to veto competition as can be done under the closed conference system. Carrier management should not be restrained from making and executing decisions designed to improve their own welfare, including the decision to join a conference. I therefore advocate maintaining the present open conference system.

SHIPPERS' COUNCILS

I feel that Shippers' Councils would be too limited in their scope of authorized activities to produce significant contributions toward enhancing export capabilities. Furthermore, the need for Shippers' Councils would be negated under the open conference system.

I support the Shipping Act of 1981, except to the extent outlined in this statement, and thank the Merchant Marine Subcommittee of the Committee on Commerce, Science and Transportation for the opportunity to present these recommendations.

Statement of Evan Pugh, Conference Secretary, Pacific/Australia-New Zealand Conference

Mr. Chairman and Members of the Committee, my name is Evan Pugh. Although I have but recently assumed the position of Secretary of the Pacific/Australia-New Zealand Conference, on whose behalf these comments are submitted, I have spent my entire adult life, some thirty-three years, in the shipping industry, ten of them specifically in the trade served by this Conference.

The Pacific/Australia-New Zealand Conference ("PANCON") is a small conference, comprised of four lines: Blue Star Line Ltd, Columbus Line, Farrell Lines, Ltd., and Pacific Australia Direct Line. One line serves only Australia and another, only New Zealand; the other two lines serve both destination countries. There is active nonconference competition in the trade. Despite the smallness of its size, PANCON has been a hotbed of regulatory furor over the past several years, particularly, as will appear, in matters involving the increasing infusion of the U.S. antitrust laws and philosophy into the regulation of ocean shipping; and we therefore strongly support the intentions of S. 1593 to reverse that alien encroachment.

We have read the testimony given before your Committee by Mr. H. P. Blok, on behalf of the two West Coast-Latin American Conferences and the later-submitted testimony of Mr. Donald I. Thiess, on behalf of the Pacific Coast European Conference. We join in the views of those conferences generally, but wish to add the following additional comments.

ANTITRUST CONCEPTS

In common with those other commenting conferences, as with virtually every other commentator who has appeared before your Committee, we express our wholehearted support of the provisions of S. 1593 designed to remove the double-edged sword of antitrust exposure, in the administration of the Shipping Act. Recent experience of this Conference with both sides of that sword may provide useful examples of why such relief is warranted.

Illustrative of the problem caused by the *Svenska* "public interest" standard is the handling which has been given to a common-garden-variety "48-hour" agreement between PANCON (as one party) and an outside competitor, a matter which has been pending before the Conference since April of 1980. Although the agreement would permit the parties to meet, confer and agree on rates and practices, because it also permits them on short notice to go their separate ways, we considered it a very modest "invasion of the antitrust laws," indeed. Apparently the general trade was of similar view, since no party at any time has appeared to protest, or even to comment upon, this filing. Notwithstanding this total lack of outside objection, and even after the parties to the agreement responded to a series of written inquiries from the Commission staff, the Federal Maritime Commission, in an order entered this past February, disapproved the agreement for lack of "answers" to a series of "unresolved questions", whence, the order concluded, "the Commission is unable to conclude that Proponents have justified this agreement." On further petition by the "proponents," the matter has now been assigned a formal Commission Docket number and—still entirely unopposed, insofar as we are aware—referred to an administrative law judge for formal hearing.

With respect to the other aspect of the antitrust encroachment, the *Carnation*-created exposure to antitrust penalties and treble damages, it is pertinent to note that this Conference and its members, as well as their East Coast counterparts, are currently involved in a wide-sweeping Department of Justice Civil Investigative Demand ("CID") proceeding; additionally, some of the members individually (from both Coasts) are defendents in a private treble-damage suit; recently brought in Chicago. Inasmuch as both of these matters are presently pending before the courts, I believe it would be inappropriate for me to discuss their particulars in any detail. Their mere existence, however, provides concrete up-to-date illustration of the reality of the perilous dual-standard regulation which the *Carnation* doctrine has produced.

The PANCON member lines therefore speak from vivid first-hand experience when they add their voices to the general concern which has been expressed to your Committee, and which you appear fully to recognize, that the antitrust-created problems simply must be resolved. The shipping industry simply cannot long survive the present whipsaw position into which it has been placed.

ASSESSMENT OF PENALTIES

We wish to address one other issue which, insofar as we can determine, no other current commentator has addressed, and which we believe deserves your Committee's careful consideration—or as it is in fact, reconsideration.

In the 1979 fervor to stamp out unlawful rebating, Congress for the first time in its delegation of responsibility to any regulatory agency granted to the Federal Maritime Commission plenary penal-assessment power, for infractions of the Shipping Act and even—significantly—infractions of the Commission's own self-created rules and regulations. Prior to that legislation the Commission was, in common with many regulatory agencies, empowered to assert and "compromise" civil infractions; however, the authority to "assess" penalties was, also in common with the regulatory-agency framework generally, left to de novo proceedings in a federal district court.

Section 15 of S. 1593 would perpetuate the post-1979 state of the law, under which the agency is empowered to act as investigator, prosecutor, judge and jury, all rolled into one. This is an extraordinary grant of authority to a nonjudicial forum, which, as noted, has no parallel in any other regulatory setting. The Commission first sought such penalty-assessment power in the early 1970's, in connection with what was to become Public Law 92-416 (86 Stat. 653). Congress however rejected the proposed transfer, stating, through this Committee:

"H.R. 755 as passed by the House contained a provision which would have authorized the Federal Maritime Commission to assess civil penalties for violations of those sections of the Shipping Act, 1916, subject to the Commission's jurisdictions, and the Intercoastal Shipping Act, 1933. This also would have applied to violations of the Commission's orders, rules and regulations. Opposition was expressed to this Committee to granting the Commission authority to assess a civil penalty in lieu of referring the violation to the Justice Department for prosecution. It has been contended that such a procedure would undermine the very concept of due process under law, as the very nature of the administrative agency process necessarily makes the agency peculiarly ill-suited for the imposition of punitive sanctions.

"Section 3 of the bill, added by the Committee, authorizes the Commission to compromise the amount of civil penalties rather than to assess the penalty. Under this procedure should the "violator" and the Federal Maritime Commission fail to arrive at an accepted compromise, the penalty could only be recovered in a de novo proceeding in a U.S. district court." Sen. Rep. No. 92-1014, 92d Congress, 2d session (1972).

As noted, however, when the matter was re-proposed in connection with the 1979 anti-rebating legislation, the voices of concerned opposition were subordinated to an understandable—if, we respectfully suggest, over-zealous—concern for "law and order."

Although to our knowledge the Commission has to date used this plenary power only sparingly, if at all, we believe its existence cannot help but breed serious mischief in the years to come. We accordingly urge the Committee to consider anew the restraint which it exercised in 1972. Additionally, our counsel, who feel particularly strongly about the matter, would, time permitting, be appreciative of the opportunity to submit, for the Committee's close attention, a supplemental paper specifically directed to this point.

In somewhat the same vein, we would urge the Committee also to give some contemplative thought to the wisdom of continuing another draconian measure passed in the anti-rebating ardor of 1979, the tariff-suspension power carried forward not only in Section 15(b) of S. 1593 (for rebating violations) but also in Section 14(c), for failure to comply with a subpoena or a mere order of discovery. Tariff suspension means, in the context of the Shipping Act, quite literally putting the affected carrier out of business—legally, for the duration of the suspension, but in reality, often permanently. Yet there may be many entirely valid reasons (beyond simply those which may catch a busy President's eye—perhaps many months later—as constituting issues of "national defense or foreign policy") for such failure of compliance.

Again, we believe the Commission has—perhaps in recognition of its soberingly awesome nature—refrained from exercising this punitively powerful regulatory weapon, in the two years since its grant. However, one must certainly assume that it will be used, at some point or other. And, as with the grant of penal-assessment power, we respectively suggest that this may have been an instance where Congress allowed the pendulum of governmental power—especially in the context of a single government's power, in the multi-national setting which ocean shipping inevitably is—to swing too far.

Although, of course, this Conference strongly welcomes the appearance of S. 1593 and its parallel S. 125, and supports their purposes whether or not remedial action is taken on the enforcement issues herein discussed, at the same time it appears to us likely that, once legislation along the lines of either S. 1593 or S. 125 has been enacted, Congress will not again in the near future turn its attention to maritime regulatory measures. We feel obliged, therefore, to raise our concerns on these already-enacted penal provisions in this forum, lest the opportunity to raise them at all be lost for another decade or more.

CONCLUSION

Once again, we join with the numerous other commentators who have expressed their keenest appreciation of this Committee's clear recognition of the major problems affecting the U.S. liner industry today, and the strong and forthright proposals it is advancing to correct them. We appreciate, as well, the opportunity to have this Conference's additional views considered, in connection with this vitally important legislative endeavor.

STATEMENT OF DONALD I. THIESS, CONFERENCE CHAIRMAN, PACIFIC COAST EUROPEAN CONFERENCE

Dear Mr. Chairman and Members of the Committee, unfortunately, due to time constraints and other factors, I was unable to appear in person before your Committee to testify on behalf of the Pacific Coast European Conference on the captioned proposed legislation. I understand, however, that you would still welcome our written comments on this bill, same as your Committee has heard from us on predecessor maritime regulatory reform efforts over the past few years. Accordingly, we submit the following, representing the unanimous views of the Pacific Coast European Conference member lines on this important legislative matter. I understand these comments will be made part of the record. The present PCEC member lines on whose behalf I make this submission are identified on the signature page of this statement.

While we do have some suggestions for improvement, by and large this conference warmly endorses both the intent and the language of the Bill. We are gratified that this Committee obviously recognizes the absolute necessity for reform of the 1916 Shipping Act, both to reflect the political and commercial realities of the liner business in the 1980's, and to reverse the crippling results of various agency and court decisions which have imposed the domestic precepts of the U.S. antitrust laws upon the international regime of ocean shipping.

IMMUNITY FROM THE ANTITRUST LAWS

By far the most pressing need for the regulated shipping industry is a clear, across-the-board, immunity of its activities from both the reach and the philosophies of the U.S. antitrust laws. Taking the latter problem first, that is, the presently almost total influence of domestic antitrust concepts into the Section 15 approval process, we believe that Section 6 of the Bill firmly addresses and corrects the present aberration and we wholeheartedly endorse it.

As for the problem of "double-jeopardy" exposure to both Shipping Act penalties and the full gamut of antitrust sanctions, we believe that with two exceptions, your Bill also affectively deals with this devastating situation. Our two general concerns over the Bill as presently drafted in this regard have already been mentioned by knowledgeable observers in testimony given before this Committee during the week of September 21, namely (1) the fear expressed by my colleague, Mr. Henri P. Blok, of the possibility of retroactive antitrust and Shipping Act penalty exposure by reason of the technical language of certain provisions in Section 12 of the Bill, and (2) the probably unintended limitation of antitrust immunity for carrier agreements reducing or eliminating competition only "among themselves". As noted, these drafting shortcomings have been pointed out by other witnesses, and we will not repeat the arguments here, but we do emphasize that such suggested revisions are absolutely necessary if the overall intent of this crucial legislation is to be carried out.

With these two issues solved, we unanimously support your Committee's efforts to cure the present deplorable state of affairs which presently exists in this area.

INTERMODAL AUTHORITY

Again, we enthusiastically endorse the proposed clarification respecting conference intermodal authority and the concomitant recognition that such is absolutely necessary. Indeed, in this latter respect we cannot improve on the succinct statement of the Maritime Commission contained in its recent brief in the controversial *United States* v. *Federal Maritime Commission* case: [1]

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[1] D.C. Cir. No. 79-1299, Rehearing En Banc pending.

"Because the increasing availability of through intermodal services is indisputably a progressive transportation development, entities which either refrain or are barred from offering these services are at a distinct competitive disadvantage and will be left by the wayside."

While fully supporting your Bill on this important subject, we are somewhat troubled by what we read as a new requirement that agreements between different modes relating to through transportation must be filed for Commission approval. To have to wait for a number of months, at least, for Commission approval of a simple rate division arrangement between carriers who do not compete with each other would stifle, not enhance, the growth of intermodalism. Accordingly, we urge that Section 4(b) "agreements" not be made subject to the Sections 5 and 6 Commission approval requirements.

LOYALTY CONTRACTS

As this Committee is aware, while effective, binding shipper loyalty contracts and devices—necessary to insure the long-term support of shippers and thereby make investments by shipowners in the trade more attractive—are the rule in virtually all other major trade lanes, in the U.S. trades, the dual-rate contract allowed by present Section 14b of the Shipping Act is almost useless. Hence, we endorse the modest reforms in this area which would be made in Section 7 of the Bill authorizing a "series of spreads" and placing the burden of proof for contract violations on the shipper. At the same time, however, we urge you to use the broadest possible language in the final draft of your bill to allow conferences to negotiate other contract forms and provisions with shippers or shipper groups. If, as we believe is the case, your Bill intends to emphasize commercial, rather than governmental, solutions to various shipping problems, then you should allow for as much flexibility as possible respecting loyalty contracts. For example, conferences should be permitted to utilize more than just one, single contract, for all commodities and with identical provisions for each. Different commercial circumstances and needs (on both sides, shipper as well as carrier) often exist, as between dissimilar cargo movements; and carriers should be able to meet these commercial realities with appropriate contractual instruments.

Finally, the Bill should allow patronage contracts to be applied to multi-modal as well as port-to-port traffic, something which the Justice Department has been vigorously contesting in the courts of late.

SELF-POLICING OF INDEPENDENT LINES

While this is the only subject on which our member lines are not unanimous, it is their overwhelming consensus that non-conference carriers should be required to retain neutral body policing services. Because of the truly international nature of liner shipping, no single government agency can in reality effectively police tariff-adherence requirements. This can only be practically accomplished by using commercial, not government, policemen, and we urge the Committee to not continue the present distinction between steamship lines who operate under a Conference Agreement, and those who do not, vis-a-vis policed adherence to filed tariffs. As matters presently stand, outside lines benefit appreciably by the assurance that price decisions by the conference lines are, indeed, "solid", yet these independent carriers not only need not sell their services on the basis of tariff-filed prices, but they also do not have to share in the not inconsiderable expense of hiring neutral-body enforcement agencies.

OTHER PROVISIONS

Mr. Chairman, the matters just discussed are those of overriding importance to the regulated industry contained in this proposed legislation. The Bill contains other provisions of less magnitude, but which would have not-inconsequential effects on liner companies, some of which we will now briefly discuss.

1. *Freight Forwarding.* Provided that the bonding provisions of Section 11 of the Bill are clearly understood to cover "injured" carriers as well as shippers (since either one is as likely as the other to be the party left "holding the bag"), the $150,000 surety bond seems to us entirely reasonable, particularly in light of the deletion of the existing law's licensing requirements. We also endorse strongly the Bill's requirement of similar bonding for "NVOCCs"—heretofore, an entirely unregulated and too-frequently financially unstable element of the U.S. shipping scene.

We are however, concerned with the language of Section 11(c), which, in tracing the verbiage of earlier bills, appears, we suspect inadvertently, to invite mischief in areas not currently presenting any problem. We are concerned with the verb phrase "*shall* . . . compensate" forwarders (even when qualified by the subsequent word "only"), in substitution of the present law's provision that carriers "*may*" so compensate, "*to the extent of the value rendered.*" There are a significant number of exporters on the U.S. West Coast with quite sophisticated, experienced shipping departments within their own organizations, who thus not only do not need independent freight forwarders to handle their exports, but are concerned, and reasonably so, that anything resembling a mandatory requirement on ocean carriers to pay freight forwarder "compensation" on their shipments will eventually have to be reflected in higher freight rates. The present statute's language, in this respect, is in our view far preferable to the language of Section 11(c).

Secondly, we fear some wholly inadvertent dislocation of customary practice, by reason of Section 11(c), in two significant respects:

(1) Under Section 11(c)(2), if a forwarder selected by the shipper merely "confirms the availability" of cargo space and processes certain documents, the carrier may be obliged to pay compensation; at the same time, Section 11(c)(2) may be read as forbidding the carrier from also paying separate brokerage compensation to a cargo broker who actually solicited and booked the cargo. This would deprive U.S. cargo brokers, of which there are a substantial number on our Coast at least, of their only source of revenue, and, perhaps sooner than later, their livelihood, and would deprive carriers of the right to select, contract with, and compensate persons for the vital service of securing cargo, on a commercially determined basis.

The draft provision is, as already noted, contrary to current law which states that a carrier "may compensate [forwarders] to the extent of the value rendered such carrier."

(2) Section 11(c) could also—albeit illogically—be read as prohibiting carriers from compensating their agents for booking cargo. Since, under Section 11, the carrier may be obligated to compensate a forwarder who merely "confirmed the availability" of cargo space (and processed documents), and cannot pay compensation twice on the shipment, one could interpret the present language as barring the carrier from compensating its own appointed steamship agent for the service of soliciting, booking and documenting the shipment, the sine qua non of a steamship agent's function, from time immemorial.

We urge the Committee's careful review of Section 11, in light of these potential problems.

2. *Reparations—Undercharges.* As the Committee is, we believe, fully aware, the Federal Maritime Commission some years ago assumed jurisdiction over "overcharge" claims of shippers against carriers, in instances of disputed tariff interpretation or other tariff deviation. When faced with the correlative situation of carrier claims for undercharges, however, the Commission concluded that, inasmuch as shippers were not specifically denominated as "persons subject to" the Shipping Act, it was powerless to afford relief. As a consequence, the anomalous situation has developed whereby shippers' overcharge claims may be and routinely are fuly litigated before the Commission, while correlative undercharge claims, even on the very same shipment, and even as a matter of mere set-off, are simply ignored in the agency proceedings, such claims being left to be pursued separately, in carrier-instituted court proceedings.

Although it has been questioned whether the equation of "ovecharges" with "reparations" was in fact a proper interpretation of the law, we do not quarrel with the Commission's exercise of this jurisdiction; but only with the lack of symmetry and consequent double expense imposed on the carrier—first to defend against an overcharge claim before the Commission, then to commence and prosecute a separate and independent undercharge claim in a de novo judicial proceeding.

It appears that S. 1593 may be trying to rectify this anomalous imbalance. The prohibitions of Section 12(b), coupled with the "reparations" provisions contained in Section 13(a), may vest the Commission with the jurisdictional authority over shippers (and consignees), in this respect, which it has previously felt lacking. We would suggest, however, that the matter not be left to circuitous interpretation, but be expressly spelled out in the new law. Congressional leaders in your counterpart Committee in the other House have for several years put forward legislative proposals specifically to this purpose. We believe that language along the lines of those proposals could beneficially be included in the new Shipping Act which S. 1593 contemplates.

CONCLUSION

We very much apreciate this opportunity to be able to comment on your Committee's efforts to revitalize the important liner shipping industry in the country. If we can be of any further assistance to you in these efforts, please do not hesitate to contact us.

STATEMENT OF VARIOUS TRANS-PACIFIC CONFERENCES

This Statement is presented on behalf of Japan/Korea-Atlantic and Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Philippines North America Conference, Trans Pacific Freight Conference of Japan/Korea, Trans Pacific Freight Conference (Hong Kong), Agreement No. 10107 and Agreement No. 10108, and their respective members (hereafter, the "Conferences"). The members of the Conferences are identified in the Appendix hereto.[1]

Each of the Conferences functions under a ratemaking agreement filed with, and approved by, the Federal Maritime Commission or its predecessor, and each covers an ocean borne trade from the Far East and/or East Asia to inland ports in the United States. Each conference either has intermodal authority, has filed for such authority in the past or, is presently seeking the Commission's approval action.

Representing a combined vessel and shoreside investment of billions of dollars, the conference memberships annually employ nearly 200 vessels (including the latest modern full-containerships, semi-containerships, breakbulk and Ro-Ro vessels), provide some 800 trans-Pacific sailings, serve more than 15 origin ports in Japan, Korea, Hong Kong, Taiwan, Macao, and the Philippines, more than 25 destination ports in the United States, as well as hundreds of inland intermodal U.S. destinations.

The Conferences are extremely gratified over introduction of the bill, S. 1593, which, they believe, represents the first meaningful effort in recent years to revise the regulatory laws of the United States governing international liner shipping operating in the U.S. foreign commerce. As its author, Chairman Gorton, has indicated, the bill is aimed at restoring the Shipping Act, 1916, as it was originally designed, and thus at giving recognition to the conference system without risk of perpetual exposure to potential antitrust violations. As the Chairman further states, however, the bill is designed to go "much further," by reducing government regulation and eradicating "wasteful interference in commercial maritime transactions." The Conferences applaud these objectives and must stress that if the conference system is to survive as the operative means of serving our foreign commerce it can no longer afford a status quo existence. Stated otherwise, over recent years, the strength and vitality of conferences have been steadily eroded by the courts and by Commission decisions directly contrary to congressional intention.

The importance of conferences to the preservation of essential stability in U.S. foreign commerce has been repeatedly recognized by Congress and the Commission for nearly 70 years. As early as 1913, the Alexander Committee found that there is no "happy medium between war and peace" in international shipping. After an exhaustive examination, that Committee found, as had a similar British Committee studying "Shipping Rings" several years earlier: "It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: The lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be presented by legislation and either would mean a monopoly fully as effective, and it is believed more so, than exist by virtue of an agreement." (Alexander Report, H. Doc. No. 805, 63d Congress, 2d session, pp. 416-417)

Following enactment of the 1916 statute, nearly 100 conferences covering virtually every U.S. foreign trade, import and export, have been sanctioned by the Commission with the ostensible promise of antitrust immunity. In 1961 when major amendments to the Shipping Act were adopted, Congress again recognized the establishing characteristics of conferences and sought to strengthen the conference system by authorizing dual rate contracts with shippers and consignees. The Senate Commerce Committee observed:

"In order for the ocean common carriers and conferences serving our foreign commerce to do so on a regular, dependable, and nondiscriminatory basis, they must be allowed, as they are throughout the rest of the maritime world, to enter into dual-rate contracts with shippers and consignees. Otherwise, the economies of ocean shipping will force the lines concerned into rate wars among themselves that might result in the destruction of ocean common carriage." (Sen. Rept. No. 860, 87th Congress, 1st session, p. 10)

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[1] The views expressed herein are the collective views of the Conferences. Individual carrier members have, in some instances, commented separately or through organizations such as CENSA or CASO. We are aware of no conflicts in positions filed, but point out that the particularized views expressed by individual members of the Conferences elsewhere should not be considered as being in any respect modified by these comments.

That concern was again carried forward in the recent enactment of the Ocean Shipping Act of 1978 (Public Law 95–483) where this Committee was called upon to strengthen the hand of the traditional liner carriers in dealing with the intense, and unfair, competition from state-controlled carriers. In reporting the bill which was finally adopted, this Committee observed:

"As a general rule, major liner companies are members of shipping conferences because conferences encourage the stability required by liners to finance the regular, frequent services they offer shippers, and to warrant investment in new and improved services to the shipping public. . . . Often they (non-conference carriers) choose to operate as independents and can offer rates below those set by conferences because they are not committed to offering the variety and permanence of service necessary to promote stability in the trades. . . ." (Sen. Rept. No. 95–1260, 95th Congress, 2d session, p. 3)

Today, in this time of high cost technology in terms of vessels, terminals and equipment, complicated as it is by persistent inflation, and near-continuous overtonnaging in our major trades, the stability and reliability provided by the Conferences becomes all the more essential. Notwithstanding, the ability of conferences to influence and nurture stable trading conditions in our foreign commerce is being seriously undermined by the judiciary, abetted by traditional anticonference factions in the Department of Justice, which, as Senator Gorton suggests, has turned the intended policy "on its head." Ironically, however, it was the Federal Maritime Commission that was the architect of the *Svenska* Doctrine [2] which was ultimately affirmed by the Supreme Court as the law of the land. What is needed, therefore, is not only a return to the original policy considerations underlying international shipping transactions but a revision which is clear enough to insure against the perpetually shifting and conflicting "policies" that have been generated from outside the legislative branch of Government. As even the Commission's comments on this proposal, while offering firm support, would appear to reintroduce some of the same antitrust considerations, the need for absolute clarity in draftsmanship becomes all the more imperative.

A current example of this dilemma lies in a pending attack of the Department of Justice against the Commission's statutory authority to approve intermodal arrangements. In *United States of America* v. *Federal Maritime Commission, et al.*, No. 79–1299, Court of Appeals for the District of Columbia Circuit, pending, the Justice Department has now persuaded the Court of Appeals to grant en banc reconsideration of the decision of a panel of three judges upholding the Commission's statutory authority to approve, and thereby immunize from antitrust attack, conference intermodal authority. As considerable amounts of conference cargoes are increasingly moving under intermodal (ocean/rail/truck) arrangements, it is self-evident that conferences can ill-afford any further delay in obtaining a clear and precise reaffirmation of the Commission's statutory authority.

The Conferences strongly support the policy objectives as set forth in section 2 of the Bill. The development of efficient transportation systems through commercial means with a minimum of Government involvement, the fostering of reliable and responsible services by both carriers and conferences, the assurance of non-discriminatory rates and practices, the harmonization of U.S. shipping practices with those of major trading partners, the fostering of cooperation among carriers and rationalization of services, and the facilitation of efficient and timely regulation are all extremely salutary objectives—objectives which the Conferences believe should serve to place carriers of all nationalities on an equal footing, including the Conferences' American flag members.

Two significant provisions of the bill may be said to center around section 6(b) and section 8 which would immunize agreements and cooperative activities from antitrust attack. Under the former, it is observed that traditional Shipping Act standards have been restored and the so-called "public interest" standard has been eliminated. It was, of course, under this standard that domestic antitrust principles have found their way into the Shipping Act. The Conferences vigorously support these provisions which should, once and for all, rid conferences of the stigma of the *Carnation* and *Sabre Line* precedents.[3]

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[2] *Aktiebolaget Svenska Amerika Linien* v. *FMC*, 390 U.S. 238 (1968).

[3] *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966); *Sabre Shipping Corporation* v. *American President Lines, Ltd.*, 285 F. Supp. 949 (S.D.N.Y. 1968).

It is of interest to note that it was many of these very conference members who fell victim to the *Sabre Line* rationale where conduct thought to be immunized was found not only to violate the Shipping Act but to be susceptible to treble damage antitrust exposure as well.

Of much importance also is section 4(b) which seeks expressly to clarify the Commission's authority to approve (and thus immunize) conferencewide intermodal arrangements among ocean common carriers or with other combinations of inland carriers establishing through routes and rates to and from inland points. Indeed, the major trans-Pacific conferences were the first conferences functioning in our foreign commerce to implement conferencewide intermodal authority to U.S. inland destinations. Today, the Conferences are nearly 100 percent containerized and a growing percent of the cargo carried by their members moves under single factor through bill transportation arrangements. In the Hong Kong/Taiwan trade, through intermodal cargo has increased to the point where traditional, port-to-port cargo now makes up only a declining minority of the total cargo carried by the members. In other trades, intermodal cargo varies from 25-50 percent of total cargo carried. Without the ability to regulate and control this significant and rapidly growing segment of the trade, the Conferences would be unable to achieve their primary role of providing for trade stability. Without exaggeration, if conferences are to be deprived of the tools with which to deal with technological advances indigenous to the ocean shipping industry, the system itself cannot survive. But, as suggested earlier in this Statement, if the Justice Department has its way, that would be assured result.

Another important provision of the bill which the Conferences applaud is section 6(c) which would shift the burden of proof to persons opposing approval of conferences and other arrangements and which would overrule the Commission's *Svenska* rule whereby filing parties are called upon to justify their arrangements from an antitrust perspective and in extraordinary detail. Although section 15 of the Shipping Act, by its express terms, requires the Commission to approve all agreements filed for approval absent findings of contrariety, the public interest standard of the provision has been effectively used, under the *Svenska* rationale, to impede the approval of many agreements Congress obviously has wished to sanction.

The Conferences also support the bill's intention under section 6(e) to end the crippling delay in processing and acting upon section 15 arrangements by fixing the time within which Commission decisions must be forthcoming. For many years, the *Svenska* rule has operated to clog the Commission's docket with the result that agreement processing—entailing months and even years of soul-searching—has frustrated the efforts of conferences and others to keep pace with real world commercial development. The bill's recognition is section 7 of a conferencewide right to employ loyalty arrangements with, if desired, multiple spreads; the bonding of nonvessel operating common carriers under section 11(a), and the one year limitation on reparations claims under section 13(e) are all steps in the direction of sensible regulation.

Although the Conferences support of the bill is enthusiastic, they nonetheless entertain certain serious concerns to which they respectfully invite the Committee's attention. These concerns are appended as an Attachment to this Statement.

The Conferences wish to thank the Committee for this opportunity to present their views, and they shall be anxiously awaiting the Committee's deliberations.

ATTACHMENT

1. Antitrust

The Conferences strongly support the antitrust immunity contained in section 8 which, as they understand, is intended to exempt from the antitrust laws the activities described therein whether or not they are found to have been authorized under an agreement approved by the Commission. As with section 6, this provision merely restores the original intent of the Shipping Act prior to the *Carnation* and *Sabre Line* cases.

To be absolutely certain that the Committee's intentions are realized, the Conferences, cognizant of a history of over 20 years of tedious litigation where the congressional intention has uniformly been subverted, would revise subsections (a) (1) and (2) of the provision to read as follows:

(1) Any agreement or activity described in the Act, whether or not filed with, or approved by, the Commission;

(2) Any loyalty contract described in section 3(10), or any activity pursuant to that loyalty contract;

Finally, section 4(a)(6) recodifies that portion of the existing language of section 15 which refers to agreements which "control, regulate or prevent" competition, but adds the qualifier "among themselves." This language was first added to last year's

House-sponsored Omnibus Bill and was never a subject of comment by the industry. Its totally adverse effect on conferences cannot be overstated. This is because virtually every action taken by a conference to "control, regulate or prevent" competition among its members may be said to affect nonconference carriers or other third persons competing in a trade. In fact, the mere formation of a conference could be said to affect or "regulate" the competitive posture of nonconference carriers. Accordingly, to prevent the apparently unintended effect of emasculating the authority granted to conferences in the remainder of section 4, deletion of the words "among themselves" from section 4(a)(6) is believed imperative.

2. Intermodal

Section 5(c)(4)(B) of the bill forbids Commission approval of any intermodal agreement which fails to provide for the right of independent action by air carriers, rail carriers, motor carriers or common carriers by water not subject to this act to establish their portion of through intermodal rates "or to establish rules and regulations which apply exclusively to the services performed by such carriers." While the import of this provision is not entirely clear, it would appear to mandate the right of inland carrier modes to deviate from the rates, rules, and regulations contained in a conference's water, rail or truck tariff.

Intermodal agreements and arrangements ordinarily result from negotiations between ocean carriers, or under section 4(b) of the bill, conferences of ocean carriers, on the one hand, and other intermodal (rail, air, motor, domestic water) carriers, on the other. Once these negotiations are concluded, the ocean carrier or conference of carriers ordinarily publishes and files an intermodal tariff delineating the services, rates, rules, regulations, and division of revenue agreed upon. The inland carriers then signify their agreement to the ocean carrier or conference tariff by filing their concurrences, indicating each carrier's willingness to accept the matters specified in the tariff and each carrier's willingness to serve at the rate so specified.

If the provision in section 5(c)(4)(B) means that an intermodal (rail, air, motor) carrier has a right to vary its concurrence in the intermodal tariff, to, for example, assess terminal charges in the United States different from those in the agreed-upon intermodal tariff, then the reason for having uniform, joint agreements is nullified. The necessity for shippers to examine in detail and determine whether an individual inland carrier's holding out represents a departure from the norm generally represented by the joint tariff undertaking would burden shippers in U.S. foreign commerce in an unwarranted manner.

For foreign based shippers, such as those in the Far East served by these Conferences, the burden would be insurmountable as tariffs of inland carriers would not be available overseas. Foreign shippers, moreover, deal only with the ocean carrier who issues a through intermodal bill of lading. They know nothing of the carrying capability or service quality of the different U.S. inland carriers and, as a practical matter, they do not participate in the selection of such carriers for the inland movement. For that reason, as well, it is essential to the development of intermodal transportation that the several inland carriers providing the inland leg of an intermodal movement under a single conference tariff, provide the identical service to shippers for the identical cost. Otherwise, the uniformity authorized by the conference agreement and implemented through the conference tariff would become meaningless—and it is the shippers and consignees who will suffer the most through the uncertainty of what services will be performed and at what cost.

This is not to say that an inland carrier must always concur in a conference tariff (although there are times where its common carriers holding out may require it to do so); it is to say that, having concurred in the conference tariff, the inland carrier must live with it, or negotiate amendments which are thereafter incorporated in the intermodal tariff on file with the Commission. Accordingly, the bill should not require disapproval of an intermodal agreement because it does not permit the inland carrier the freedom to disavow its concurrence.

3. Self-policing

In September 1978, the Federal Maritime Commission adopted revised self-policing regulations (General Order 7) which not only mandate outside neutral body policing for all conferences, but also impose complex and complicated regulations controlling the procedures for policing conferences' obligations and recordkeeping. In addition, the regulations require conferences to delete from their agreements provisions which have, over many years, served to protect the confidentiality of self-policing records which are reposed in the repositories of the policing authorities.

The regulations announced the intention to free-up these records for the purpose of second-guessing the policing authorities and, where merited, to impose civil penalties in addition to those assessed by a conference's policing authority. The

Conferences herein challenged the regulation's validity in the Court of Appeals in the District of Columbia Circuit, contending that the regulations were in excess of the congressional intent. In a split decision, a panel of the Court upheld the regulations despite persuasive legislative history to the contrary.

The future of conference self-regulation thus stands at a crossroad. The threat that documents which have been voluntarily turned over to policing authorities in confidence may be subsequently seized by the Commission to mete out additional sanctions is now real and not imaginary. It is the opinion of most knowledgeable shipping officials, however, that any demand for self-policing records to carry out Commission investigations of Shipping Act violations will signal the end of effective self-regulation. A system of conference self-policing, like any system of self-regulation depends, ultimately, on the cooperation and the good faith efforts of those who are being policed. Yet, conference members can scarcely be expected to make their records accessible, and freely cooperate with self-policing agencies without resort to legal processes, if the fruits of those investigations are to result in Commission-imposed penalties or suspension of member services. The conferences urge, therefore, that section 5(c)(3) be amended by adding the following provision: "*Provided*, That self-policing records in the possession of the independent neutral body may not be used as a basis for imposing civil penalties."

The Conferences further submit it is neither logical nor fair to police conference carriers to the exclusion of nonconference carriers and NVOCC's. Surely, the Commission's investigations over the past several years have demonstrated that conference carriers have no monopoly on malpractices. This is particularly evidenced by the NVOCC's which have entered into various settlement agreements with the Commission in respect to matters pertaining to section 12 of the bill ("Prohibited Acts"). The Conferences must, therefore, urge that the bill be amended as to apply equally to their competitors—both the carriers operating outside conferences and the NVOCC's.

4. Shippers' councils

While, conceptually, the Conferences do not oppose the concept of shippers' councils, they believe any U.S. regulation must be limited to councils which are domiciled in the United States and which are concerned with the U.S. outbound trades. Section 4(c) of the bill, which is restricted to councils organized or existing under the laws of the U.S., would appear to comport with that intention. However, other sections of the bill (section 3(18), 5(c)(5) and 5(d) make this not altogether certain.

For many years, of course, shippers' councils have been organized and in operation in the foreign countries which the Conferences herein serve. We trust that there is not intention to require these bodies to file their organizational agreements for Commission approval, as this could lead to a direct collision with the laws of our trading partners which, in many cases, have mandated their formation and operation. The bill should, therefore, be appropriately clarified by limiting shippers' councils under section 3(18) to the outbound trades.

In many U.S. inbound trades, conferences have been required to consult with shippers' councils abroad over many years. Congress should draw a clear line and should not sanction councils in the United States which would compete with these pre-existing councils, thereby placing conferences in an impossible dilemma. Therefore, with respect to conferences located abroad, the practice of consultation with foreign domiciled councils should be continued, as it has over many years, and as for the U.S. consignees shipping in these trades, the Conferences would expect to continue the practice of consulting with this smaller segment of traders in respect to their requests and/or complaints.

Generally, the Conferences do not object to the policy objectives of subsection 5(c)(5) of increased communication and cooperation in resolving common industry problems. They are concerned, however, that subsections (A) respecting commercial resolution of disputes and (B) requiring cooperation in preventing malpractices, are not sufficiently clear to prevent misinterpretation. While the Conferences favor commercial resolution of disputes, they are concerned that the language of (A), requiring a "process" to "insure" resolution, may imply a requirement for binding arbitration; also that the language of (B) might permit the Commission to place onerous burdens upon conferences and their members to "insure" cooperation in preventing malpractices. As these broad open-ended provisions could well invite international confrontations, it is urged that section 5(c) should be clarified in the following manner:

"(5) Provide for a consultation process designed to [insure] *promote*:

"(A) commercial resolution of disputes;

"(B) *voluntary cooperation in preventing malpractice;*".

5. Loyalty contracts

If loyalty contracts are to function effectively in the container age, it is essential that they cover both port-to-port and intermodal cargoes and the Conferences understand that to be the objective of section 7. Nevertheless, and out of an abundance of caution, the Conferences urge that section 7(a) be amended as follows:

"(a) CONTRACT REQUIREMENTS.—Any conference or ocean common carrier engaged in foreign commerce may utilize loyalty contracts covering all water service or intermodal service either separately, or in the discretion of the conference or carrier, under a single contract:".

The Conferences also submit that on the basis of some twenty years of experience the existing "legal rights" clause, repromulgated in the bill as subsection 7(a)(4), has served only to weaken, in a significant way, the enforceability of existing contracts. The Conferences, therefore, recommend that section 7(a)(4) be deleted in its entirety, and that the following new language be inserted in place thereof:

"(4) The contract covers all shipments as to which the name of the contract shipper or consignee appears on the bill of lading or export declaration as shipper, consignee or notified party."

6. Approval of agreements

The Conferences wholly support the thrust of section 6 which is designed to remove the antitrust laws as a relevant consideration in approving or disapproving agreements authorized under section 4, and to facilitate timely consideration and approval of those agreements meeting the standards of the bill. This, of course, would return the Shipping Act to the intent of the original framers in 1916 and substantially reduce the increasingly oppressive burden of defending otherwise approvable agreements against the theoretical contentions of the Department of Justice and others. It would also substantially reduce the ability of nonparties to use the Commission as a competitive forum to delay and frustrate the processing of commercially beneficial arrangements.

The Conferences, however, do have some serious reservations with section 6:

Subsection (a) would permit the Commission summarily to reject agreements which do not comply with "the requirements of section 5." Yet, several of section 5's requirements are subjective and require value judgments by the Commission, judgments which should not be made on a summary basis in the absence of input from the filing parties. For example, section 5(c)(1) requires that any limitation on a conference's membership be based on "commercially reasonable criteria." The issue of what are commercially reasonable criteria in the circumstances of a particular agreement is both a substantive and a subjective question. It should be considered as part of the approval process and not a matter of summary rejection. Furthermore, unlike tariffs over which the Commission has traditionally been granted rejection authority, agreements cannot become effective absent affirmative Commission action (or, under section 6(e), absent a 6 or 9 month delay). There is thus no need for the authority as no harm can arise from a failure to reject. Accordingly, the Conferences recommend that section 6(a) be deleted and that the following new subsection (3) be added to existing section 6(b), (to be renumbered 6(a)):

"(3) not to conform to the requirements of section 5 of this Act."

Subsection (g) would also appear to be unnecessary and would have the unhealthy effect of encouraging use of the Commission's disapproval powers as a punishment for noncompliance with a subpena or discovery order. Currently, and under the bill, the Commission is already authorized to disapprove any agreement if the proponents fail to produce relevant documents or information that is found necessary to a determination of approvability. The Conferences submit that this should continue to be the test and that technical noncompliance with a discovery order should not be made available as an independent basis for disapproval. Subsection (g) should be deleted in entirety.

7. Tariff suspension

These two provisions would permit the Commission to suspend carrier tariffs—in essence, put the carrier out of business—for failing to comply with a Commission demand or subpena for "any" violation of section 12(a) (1), (2) or (3). Such a Draconian punishment is unjustified, will lead to serious hardship among both shippers and carriers and will encourage retaliatory action from our trading partners.

Tariff suspension is the common carrier equivalent of capital punishment. In today's containerized market, a carrier's fixed, unalterable costs have been estimated in Commission proceedings to be as high as 80-90 percent of total costs. These costs will, of course, continue to be incurred during any suspension period and it is the rare carrier, if any, who could survive more than a few weeks or months with its service suspended and the flow of its revenues halted. The Conferences believe a punishment which could permanently cripple or destroy a shipping company is unwarranted and that the recently increased fines (which themselves border on the confiscatory) are more than sufficient to insure statutory compliance.

The Conferences also submit it would be unrealistic to anticipate our trading partners would accept Commission suspension of the services of their national flag fleets without taking reciprocal action. It is far more likely that any such suspension would be quickly countered by our trading partners' retaliatory action of some sort, resulting in serious, international confrontations. Moreover, the provisions are inconsonant with the policy objectives under section 2 which is to harmonize our shipping practices with those of our major trading partners. Accordingly, the Conferences urge the deletion of sections 14(c) and 15(b).

8. Prohibited Acts

The Conferences believe that the assimilation of a list of "prohibited acts" under a single provision has merit. They, however, are concerned over certain aspects of this section.

(a) *Subsection (a)(6).*—While it is true that surcharges are intended only to cover particular categories of expense or lost revenue, the Conferences do not believe it appropriate to include in a list of prohibited practices, for which fines of $25,000 per day may be assessed, the mere failure timely to reduce or remove a surcharge. Generally, the precise point in time when a carrier has been made whole is not known immediately, particularly for a conference, as the data for making the determination is not immediately available. Pending evaluation of the necessary factual material, it would be unfair to subject carriers to the risk of possibly confiscatory penalties for imposing a surcharge believed at the time to be reasonable and justified. The Conference, must therefore, urge that subsection (a)(6) be deleted from the bill.

(b) *Subsection (a)(7).*—Elsewhere in section 12(a), as with sections 16, 17 and 18 of the existing Act, the language refers to rates or practices which are "unreasonably" high or low ((a)(4)), "unduly" prejudicial ((a)(5)) or "unjustly" discriminatory ((a) (8); (11)). Subsection (a)(7), however, refers merely to "discriminatory or unfair methods" and, under a literal interpretation, could involve ambiguity and misunderstanding. The Conferences therefore believe that subsection (a)(7) should be amended by inserting "unjustly" before "discriminatory" in line 3.

(c) *Subsection (a)(9).*—Like subsection 4(a)(6), subsection 12(a)(9), which includes practices designed to reduce or eliminate the participation of nonconference carriers, would have devastating effects on the conference system. The results that could follow from this provision would appear not to have been adequately considered. For example, a rate reduction made to meet outside competition, or any number of other conference actions, most certainly could be regarded as an action intended to reduce an outside carrier's participation. If conferences are to be effective promoters of trade stability, they must be permitted to compete fairly and effectively for all cargo. Hence, subsection (a)(9) should be amended to prohibit the use of fighting ships.

9. Neo-bulk cargo

Section 3(3), by redefining bulk cargo, would broaden the current tariff exemption for softwood lumber to include "neo-bulk cargo" commodities without limitation. Under this definition, section 7(a)(10) would require exemption of all such cargo from shipper loyalty contracts. The Conferences are concerned with the imprecision of the neo-bulk definition which would appear to include any noncontainerized commodity requiring special handling. Conceivably, such major moving commodities in these conference trades as machinery and iron and steel could fall under the exemption's broad sweep. Many of these products have historically moved under dual rate loyalty contracts and their continued coverage is essential to the viability of those arrangements and to maintenance of trade stability. The Conferences, therefore, urge that section 3(3)(B) be deleted or, alternatively, rewritten to refer only to unfinished forest products.

10. Non-vessel-operating common carriers (NVOCC's)

The Conferences support the bill's bonding requirements for NVOCC's. At present, NVOCC operators appear and disappear overnight, only to appear again under another name at another port. Virtually no capital is necessary to initiate an NVOCC service as no assets are required. As a result, many are thinly capitalized and their operations are sporadic. The proposed bonding requirement should serve to inhibit the unreliable opportunists from commencing operations.

As ocean freight forwarders operate only in the outbound trades, the Conferences, all of whom operate inbound, have no comments on this aspect of the bill.

For the sake of clarity, the Conferences would amend the first sentence of section 9(a) to refer to conferences in the second line; also they suggest that "ocean" should be stricken. The Conferences know of no reason NVOCC's should be excused from Commission filing requirements. The pertinent portion of subsection (a) should read:

"(a) In General.—(1) Except with regard to bulk cargo, every common carrier or conference of carriers shall file * * *"

11. Other persons

The Conferences believe that the regulation of "other person[s] subject to this Act" should be confined to U.S. domiciled persons "engaged in the business of consolidating, freight forwarding or furnishing wharfage, dock, warehouse, or other terminal services in connection with an ocean common carrier." This limitation should be consistent with the past practice of the Commission which, to the Conferences' knowledge, has refrained from regulating foreign domiciled persons. For the Commission to attempt, for example, to require foreign terminal operators to conform to tariff filing requirements imposed on U.S. operators, or to require filing of agreements between or among such foreign domiciled persons in the manner required in the United States would not only be an exercise in futility, but would involve the Commission in endless and needless confrontations with our trading partners. Accordingly, section 3(13) should be amended to read: " 'other person subject to this Act' means any person engaged *in the United States* in the business of consolidating, freight forwarding, or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with an ocean common carrier."

APPENDIX

American President Line, Ltd.
Barber Blue Sea Line.
Galleon Shipping Corporation.
Hapag-Lloyd AG.
Japan Line, Ltd.
Kawasaki Kisen Kaisha, Ltd.
Korea Marine Transport Co., Ltd.
Korea Shipping Corporation.
Lykes Bros. Steamship Company, Inc.
Maritime Company of the Philippines.
Mitsui O.S.K. Lines, Ltd.
A. P. Moller-Maersk Line.
Nippon Yusen Kaisha.
Orient Overseas Container Line, Inc.
Sea-Land Service, Inc.
Showa Line, Ltd.
The East Asiatic Co., Ltd.
United States Lines, Inc.
Yamashita-Shinnihon Steamship Co., Ltd.

STATEMENT OF THE VIRGINIA PORT AUTHORITY

The Virginia Port Authority (VPA) is an agency of the Commonwealth of Virginia, charged statutorily with the responsibility of developing the flow of commerce through the state's ports. Within the VPA's jurisdiction are modern, efficient state-owned terminal facilities at Norfolk, Portsmouth, and Newport News. It is within this context that the VPA respectfully submits these remarks.

Within the past 3 years, the transportation industry has seen the passage of the Airline Deregulation Act of 1978, The Motor Carrier Act of 1980, and the Staggers Act. The very nature of airline, truck, and railroad carriage, respectively, has changed through this considerable legislative effort. We feel that Congressional attention now has rightfully turned to the shipping industry, an industry governed by a statute woefully outdated, and we hail the introduction of Senate Bill 1593 and its objectives.

The Virginia Port Authority would suggest, however, the following changes that we feel would foster the development of the foreign commerce of the United States, its shippers, ports, and carriers:

1. INDEPENDENT ACTION

The VPA feels very strongly that the right of independent action should be mandatory within every conference. Independent action is certainly not a novel concept in transportation, in fact, it represents the norm rather than exception.

American domestic carriage via airlines, trucking, and railroads has at its heart the ability of carriers to offer such flexibility of rates to shippers. Nor is independent action foreign to steamship conferences or agreements—several currently sanction such action in their regulations (for example, the South Atlantic-North European Agreement allows its members the right of independent action on 48-hours notice).

Moreover, the requirement of independent action is in accord with the aim of the legislation to allow steamship lines the flexibility to make commercial decisions without fear of reprisal. The grant of independent action allows individual conference members to decide for themselves in an individual, commercial manner, the benefits and consequences of exercising such power. Simply stated, if one of the rationales for removing Justice Department scrutiny of agreements is to allow lines to make decisions in a commercial environment, the grant of independent action is consistent with that goal.

The benefits of the right of independent action are obvious—it provides lines with flexibility to meet shippers' needs without the burden of cumbersome, stifling conference rate machinery and it promotes efficiency, for the firm able to trim its costs is in better position to offer lower rates and still receive an adequate rate of return. Finally, the grant of independent action injects into the conference system an element of the competition that has the basis of free enterprise in this country since its founding.

Therefore, we suggest that the following language be added as a subsection 5(4)(c): *grant the right of independent action for its members upon reasonable notice of at least (10) days.*

2. TERMINAL AGREEMENTS

Since port authorities generally in the course of their business furnish wharfage, dock, warehouse, or other terminal facilities, it is clear that our agreements would continue to be within FMC purview. But the requirement for FMC approval of terminal leasing agreements has distorted the sphere of commercial practices. Specifically, parties are forced to delay implementation of contracts that have been negotiated and executed while the FMC ponders over approval. That parties must wait an undeterminable time in limbo is absolutely unacceptable, especially when the benefits accruing from the exercise of such review seem slight in the case of such agreements.

We suggest that section 3(1) of S. 1593 be modified as follows:

"(1) 'Agreement' means understandings, arrangements, and associations, written or oral, and any modification or cancellation thereof(;), *but shall not include understandings, arrangements, written or oral, involving the use, lease or sale of marine terminal facilities between 'other persons subject to this Act.'* "

3. CLOSED CONFERENCES

The VPA believes that a closed conference system may prove detrimental to shippers in this way: a shipper that has contracted for conference service may be denied use of a preferred carrier willing to join the conference but denied admission. We urge further consideration of this problem.

4. FILING OF COMPLAINTS

We feel section 13(a) should be amended to give ports the power to file complaints and seek reparation for any violation of this Act. This right is accorded by the current Shipping Act and would provide ports with the opportunity to seek redress for injuries that are occasioned by commercial practices.

5. PORTS CONTIGUOUS TO THE UNITED STATES

Finally, we urge that serious consideration be given to the goals of House Bill 3637, providing for FMC jurisdiction over common carriers utilizing North American ports outside of the U.S. for the importation or exportation of American cargo. There has been opposition to H.R. 3637 because it is perceived to be anti-competitive and extending the reach of U.S. maritime policy to a shipping operation that does not even call at U.S. ports. We think this viewpoint entirely misconceives the nature of that bill. H.R. 3637 will not prevent American shippers from utilizing a Canadian carrier, such as Cast, nor will it impede the innovative services of Cast that have found much favor from shippers. What the language of H.R. 3637 will do (and the reason that the scope of S. 1593 should include it), is place Cast on equal footing with other carriers in what is, for all intents and purposes, the United States-Europe trade. Cast would be subjected to the tariff filing requirements of the FMC, but the results would be beneficial: (a) other carriers would, at least, have knowledge of what rates Cast is offering so they would have the opportunity to compete; (b) shippers of any size would be assured that they were not discriminated against rate-wise; (c) rates detrimental to the commerce of the U.S. would be forbidden.

The bottom line is simply that it is contradictory to revamp the shipping laws of this nation with the purpose, among other things, "to assure ocean transport rates and practices for United States' exporters and importers . . . are not unjustly discriminatory and foster reliable and responsible service by ocean common carriers" while taking a hands-off approach to a carrier that reaches deep into America's heartland for cargo and thrives on a regulatory loophole. We suggest that section 3(12) be modified by adding, "*and whether by way of ports in the United States or ports in a contiguous nation.*"

The Virginia Port Authority wishes to express its appreciation for your consideration of these comments. We hope they prove helpful in some measure.

STATEMENT OF UNIVERSAL TRANSCONTINENTAL CORP.

Mr. Chairman and Members of the Committee, I am Leo Piovano, President of Universal Transcontinental Corporation ("UTC"). UTC appreciate this opportunity to comment on the provisions of S. 1593 dealing with ocean freight forwarders.

It is our view that the licensing of ocean freight forwarders by the Federal Maritime Commission (the "Commission") should be retained. However, we fully support the provisions of the bill which correspond to the changes to the Shipping Act, 1961 (the "Act"), 46 U.S.C. § 801 et seq., made by section 1608 of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981 (the "Budget Act"). That section of the Budget Act amended the definition of an independent ocean freight forwarder by removing the prohibition on the affiliation of a forwarder and a shipper. This beneficial and necessary change in freight forwarder law has recently been the subject of certain false and misleading claims. Because these claims may have injected some confusion into the consideration of the merits of including the Budget Act changes in the comprehensive recodification of the Act intended by S. 1593, I will address them in these comments.

UTC is one of the oldest ocean freight forwarders operating in the United States, having been active in the freight forwarding business since 1925. The company is also one of the largest forwarders, currently employing 272 people in 16 offices in the United States and 3 offices overseas. We move marine shipments via virtually every carrier serving the United States and handled 36,606 shipments during 1980. Our New York office alone provides forwarding services to 1,485 shipper customers. UTC is a wholly owned subsidiary of Transway International Corporation ("Transway"), a diversified transportation and distribution company. Transway is a publicly owned corporation whose stock has been traded on the New York Stock Exchange since 1929.

UTC was one of the primary sponsors of the legislation enacted in 1961 (Public Law 87-254) that added section 44 to the Shipping Act and provided for the licensing of ocean freight forwarders. The 1961 legislation was intended to correct a number of abuses and malpractices prevalent within the forwarding industry. We believe that the licensing, bonding and regulatory scheme established by Public Law 87-254 should be continued. The licensing of ocean freight forwarders has proven to be effective function of the Commission that has intended to protect the shipping community from unscrupulous and incompetent operators.

There is, however, one provision in the 1961 legislation that did not work rationally and produced results that had never been intended by Congress. Prior to the recent Budget Act amendment, section 1 of the Shipping Act, 46 U.S.C. § 801, defined an independent ocean freight forwarder as a forwarder who "is not a shipper or consignee or seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor is directly or indirectly controlled by such shipper or consignee or any person having such a beneficial interest."

The above language was intended to address the so-called "dummy forwarder" scheme, whereunder a shipper could establish his own forwarding business and thus use this device for obtaining rebates from carriers. Unfortunately, the provision was inartfully drafted. It went far beyond the simple problem of prohibiting a shipper from using his own forwarding company in order to obtain rebates. This provision is the epitome of purposeless regulation.

That definition prevented a forwarder from ever being a shipper or consignee in the foreign commerce of the United States. It produced such irrational results as preventing, among other things, a forwarder from shipping in the foreign commerce of the United States its own property (such as household or office furniture) or from purchasing merchandise that would be shipped from abroad. Also, according to decisions of the Commission interpreting section 1 of the Act, a company could not hold a forwarding license under section 44 of the Act if any parent, affiliate or associate of that company were a shipper or consignee in the foreign commerce of the United States. See, *Stute International Inc.*, 20 S.R.R. 839 (FMC 1981); *Bolton and Mitchell, Inc.*, 16 S.R.R. 87 (FMC 1975); *Hugo Zanelli & Co.*, 14 S.R.R. 2166 (FMC 1976); *North American Van Lines*, 12 S.R.R. 404 (FMC 1971). These cases held that the mere common ownership of a forwarder and a shipper was sufficient, under the pre-Budget Act requirements, to prevent the licensing of the forwarder, even in cases in which no actual control is exercised by the shipper over the forwarder. Also, it made no difference whether the forwarder did not handle the shipments of its associated or affiliated company or whether the forwarder did not receive compensation from a carrier from such shipments.

The above results were contrary to the original legislative intent. In passing P.L. 87-254, it is clear that Congress intended to prevent ocean carriers from paying compensation to forwarders in situations in which such payments could amount to rebates. In 1961, the then Federal Maritime Board had completed a series of nationwide hearings on which its legislative recommendations relating to the licensing and regulation of freight forwarders were based, and reached the following conclusion: "Malpractices were found including 'dummy' forwarding setups where in some cases huge brokerage fees were collected although little or no forwarding functions were performed, as well as a widespread lack of orderly functioning as to charges to shippers."

The reports of both the Senate Commerce Committee and the House Merchant Marine and Fisheries Committee recognized the basic purpose of the forwarding legislation to be to make such rebating through dummy forwarders or other devices unlawful. S. Rep. No. 691, 87th Congress, 1st session (1961); H.R. Rep. No. 1069, 87th Congress, 1st session (1961). Two methods for preventing such rebating were created by the legislation. First, the definition of an independent ocean freight forwarder prohibited a forwarder from having a beneficial interest in any shipment in foreign commerce of the United States or having any connection with a shipper or consignee of such shipments. Second, section 44(e) of the Act provided that a carrier may not compensate a forwarder unless the forwarder certifies that it has performed certain minimum forwarding services. This scheme proved to be successful in eliminating the problem of dummy forwarders. However, the overly restrictive definition in section 1, with its unnecessary prohibition on the affiliation of forwarders and shippers, went far beyond its intended function. This example of over-regulation made illegal conduct and "associations" which in no way involve the dangers of rebating.

As a practical matter, the major effect of the shipper connection prohibition was to protect small, family-owned forwarders from competition by multi-business organizations since it is unlikely that any such organization would not include some operation having at least some incidental shipping activities. Consequently, there was created a de facto prohibition on a freight forwarder being part of a diversified business entity. This result was never intended by Congress; the 1961 legislation was not meant to mandate that ocean freight forwarders be small, "mom and pop" operations. In addition, the shipper connection prohibition was inconsistent with the realities of the modern commercial world in which corporate diversification has been a dominant trend for some time. The pre-Budget Act definition in section 1 was incapable of accommodating the existence of holding corporations or other business entities having a number of independent, profit generating units. Such entities are commonplace today.

Not only were forwarders and potential forwarders harmed by the effect of the shipper connection prohibition, but shippers suffered as well. The prohibition inhibited the development of a modern, efficient forwarding industry by limiting access to much needed sources of capital and management expertise. Small, marginally financed forwarders can no longer adequately supply the type and quality of services required by today's shippers. Also, a concern raised by a number of shippers commenting on S. 1593 is the damage suffered by shippers due to the bankruptcy of a forwarder during the period between the payment of freight charges by the shipper to the forwarder and the payment over of those monies to the carrier. Much of the problem of under-capitalized forwarders can be attributed to the pre-Budget Act requirements which had the effect of limiting the size and resources of forwarders.

The problems associated with the pre-Budget Act definition of an independent ocean freight forwarder were well-known by both the Commission and Congress for some time prior to the Budget Act. During the Second Session of the 96th Congress, bills reported out of this Committee and out of the House Merchant Marine and

Fisheries Committee[1] contained provisions similar to those in sections 3(14) and 11(c)(4) of S. 1593 and section 1608 of the Budget Act. The provisions had received the support of the Commission, and the merits of removing the shipper connection prohibition were fully considered by both Committees. In this respect, recent statements that the Budget Act freight forwarder provisions were a surprise or were enacted without adequate examination are not accurate. The Budget Act amendments were the culmination of a long process of congressional and Commission efforts to correct an unintended and technical problem in the law.

By permitting the affiliation of a forwarder and a shipper and prohibiting a forwarder from receiving compensation from a carrier with respect to a shipment in which the forwarder has a beneficial interest, this bill, as well as section 1608 of the Budget Act, adequately protects against illegal rebating and dummy freight forwarding. At the same time, the unintended and negative results of the prior definition of an independent ocean freight forwarder are avoided. The case supporting the removal of the shipper connection prohibition is as compelling today as it was when S. 2585 was approved by the Committee during the last Congress and when the Budget Act was passed on July 29th of this year.

Recently, a few individuals purporting to speak for the freight forwarding industry have objected to the removal of the shipper connection prohibition on the grounds that it would result in the "resurgence of the dummy forwarder."[2] This conclusion is based upon the assertion that the prohibition in section 11(c)(4) on the receipt of compensation with respect to a shipment in which the forwarder has a beneficial interest is unenforceable. This is a contrived argument which has no basis in fact.

The Commission's present regulatory and enforcement powers are sufficient to prevent rebating effected by forwarders collecting fees from carriers for shipments in which they have an interest. Since the 1961 legislation, the Commission has been quite successful in detecting wrongdoing much more difficult to uncover than the practice of carriers passing rebates through a dummy forwarder. In the typical transactions among carriers, forwarders, and shippers there presently exists a myriad of possible illegal acts that could be committed. It would be ludicrous to suggest that the only way the Commission could control such illegal acts would be if the Commission monitored each and every transaction. Yet, just such an argument has been made with regard to the enforcement of the prohibition in section 11(c)(4). The fact that the Commission lacks the resources to monitor each shipment handled by a forwarder is irrelevant. There is nothing to indicate that such monitoring is necessary.

The way to fully ensure compliance with the prohibition of section 11(c)(4) is to require the complete disclosure of shipper affiliations by ocean freight forwarders. There are a number of methods to achieve this. It is our understanding that the Commission rules implementing the Budget Act changes will require such disclosure by both new and existing licensees. Another method would be to include in the section 44(e) certification, on which forwarder compensation by a carrier is conditioned, the statement that the forwarder has no beneficial interest in the shipment. Carriers would thereby be removed from any responsibility for determining whether the forwarder has an interest in a particular shipment. If the bill of lading lacks the required certification, the carrier may not compensate the forwarder. The present certification requirement has worked very well despite the fact that the Commission has not investigated each and every certification made by a forwarder to see whether the services were actually performed. We suggest that this additional certification item be included in the text of S. 1593 as an amendment to the language of the present section 44(e).

The unforceability argument is patently specious. It has been manufactured by small forwarders who fear the entrance of new, well-financed operators into the industry. These small forwarders have long enjoyed the protection afforded them by the pre-Budget Act freight forwarder provisions of the Shipping Act.

The merits of the Budget Act amendments are clear. The amendments must logically be continued in S. 1593's comprehensive recodification of the Shipping Act. Moreover, the retention of the provision would have the added benefit of vitiating the December 31, 1983 expiration date for section 1608 of the Budget Act. This would remove the cloud under which shipper affiliated forwarders must now operate. Although the Conference Report accompanying the Budget Act contains assurances that the expiration date was not meant to imply that the changes are merely temporary, the possibility that the changes may lapse has created uncertainty and negated much of the intended benefit of the Budget Act's attempt to correct the counterproductive over-regulation of freight forwarders.

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[1] S. 2585, "The Ocean Shipping Act of 1980." and H.R. 6899, "The Omnibus Maritime Regulatory Reform, Revitalization and Reorganization Act of 1980."

[2] September 24, 1981 statement of William St. John, Jr., p. 10.

We urge that the Committee retain the current freight forwarder provisions of sections 1 and 44 of the Act with the amendment to section 44(e) which we have suggested herein. It is our belief that such a course is in the best interests of the forwarding industry and of the shipping community.

STATEMENT OF VINCENT G. WILSON, SENIOR MANAGER—INTERNATIONAL DISTRIBUTION, UNION CARBIDE CORP.

Mr. Chairman, Members of the Subcommittee, my name is Vincent G. Wilson and I am Senior Manager—International Distribution, Union Carbide Corporation. My responsibilities include ocean transportation costs and services for our export and import operations. I am accompanied today by Mr. Walter E. Morgan, Manager, Transportation Policy fo Union Carbide. As a major exporter of chemicals, plastics, carbon products, industrial gases and consumer products, our export sales this year will exceed one billion dollars. Our international markets extend to 104 countries in Asia, Europe, Africa, Latin America and Australia. With our ocean transportation costs approaching 75 million dollars annually, we have more than a keen interest in and a genuine concern for the preservation and growth of a healthy, dynamic and responsive liner shipping industry. Our ability to develop and maintain our markets overseas depends on the level of our freight costs and on the quality of service, particularly in competition with foreign suppliers.

With the one exception relating to rationalization of services, we fully support the "Declaration of Policy" contained in Section 2 of S. 1593. Facilitation of efficient and timely regulation through a single federal agency is a particularly pressing need if U.S. foreign commerce is to achieve the growth necessary to achieve a positive trade balance.

The critical issues in S. 1593 that we consider most important are anti-trust immunity, independent action, closed conferences, rationalization of services, and shippers' councils. We would like to offer the following comments and views on each of these items.

ANTITRUST IMMUNITY

Union Carbide supports the exemption from anti-trust laws embodied in Section 8 of S. 1593 subject to the requirement for review and approval by the Federal Maritime Commission as contained in Section 6. We believe certain modifications are in order with respect to the "Independent Action" provisions of Section 5(c)(4). We will speak of this later in the testimony.

There has long been confusion and uncertainty regarding the application of anti-trust laws to Section 15 agreements. The immunity granted in the Shipping Act of 1916 appears to have eroded and left in doubt the Federal Maritime Commission's jurisdiction over liner industry matters.

The Maritime industry has suffered from divisiveness and uncertainty on this issue too long. Carriers and shippers alike have a right to a clear and consistent U.S. regulatory policy on this issue. The primacy of the Shipping Act and the jurisdiction of the Federal Maritime Commission over liner shipping matters require both definition in public interest and clarification of Congressional intent.

INDEPENDENT ACTION

In Section 5(c)(4) of this bill, the right of independent action is limited to the very narrow area of inter-conference and inter-modal agreements that is currently embodied within the Shipping Act of 1916.

Union Carbide strongly urges that the right of independent action be required in all conference agreements. With the implementation of complete anti-trust immunity in Section 8, some mechanism is necessary to balance the collective rate-making power of the conference system. Arguments that the exercise of independent action within a conference would sterilize the conferences' rate-making effectiveness and eventually destroy the conference itself are fallacious. On the contrary, one need only look at one of the largest conferences in the U.S., namely the pacific Westbound Intermodal Conference, which has had an independent action right within its Section 15 agreement since its inception during the mid-1970's. It is a viable conference today and there are no indications that the member carriers have used the right of independent action arbitrarily or irresponsibly.

Innovative and progressive U.S.-flag carriers can be stifled in introducing new ideas and new techniques because U.S.-flag liners are, almost without exception, a minority vote or block in conference actions. Independent action would protect U.S.-flag interests and the interests of U.S. shippers. At least one major U.S.-flag carrier is actively supporting inclusion of the right of independent action in conference agreements. This position, from a U.S.-flag carrier's point of view, is understandable.

CLOSED CONFERENCES—RATIONALIZATION OF SERVICES

Union Carbide believes in the viability of the open conference system and opposes the establishment of closed conferences in the U.S. trades. The closed conference system restrains competition, discourages the active play of market forces and naturally results in rationalization of services. We believe that rationalization between competing lines will produce unsatisfactory service and eliminate the incentive to be innovative and progressive.

The open conference system has withstood the test of time for the last 60 years and has not been the failure some of its harshest critics would have us believe. We are not suggesting retention of the status quo for its own sake. Rather we are suggesting that other aspects or regulatory reform discussed here today be given an opportunity to improve the operations of our open conference before we import and adopt a closed conference system that is not likely to be the panacea its proponents have been advertising and which may defeat the very purpose of this legislation.

We should be particularly careful about permitting closed conferences that could conceivably exclude U.S.-flag carriers from one or more U.S. trade routes. In this connection, I would like to repeat some comments made by Mr. P. G. Callimanopulos, President, Hellenic Lines Ltd., Piraeus, Greece, in a letter to the editor of Seatrade Magazine, July 1977. Mr. Callimanopulos was outlining the frustrations of his company in being denied membership in two closed conferences, between his own country, Greece, and the Mediterranean and the Far East in the first case, the second between Greece and the Mediterranean and South and East Africa in the second. His comments, in part, were as follows:

"Hellenic Lines Limited has from its inception (1934) been an avid supporter of the Conference System".

"Despite such a record of reliable liner service and manifest adherence to the conference principle, Hellenic Lines has undergone particularly bitter tribulations with closed conferences".

"Hellenic Lines, the national line of Greece, was denied the right to participate in its own country's trade under the aegis of the conference while those conferences were granting rights to other lines to call at Greece and at other countries with which their flag had no connection".

"The closed conferences, through monopolistic restrictiveness, have thus frustrated the reasonable aspirations of the national line of the world's largest maritime nation. This should no longer be tolerated in this day and age".

Hellenic Lines has been operating a regular line service between the United States, the Mediterranean and the Middle East for the last several decades as a member carrier of open conferences.

SHIPPER COUNCILS

Section 4(c) of the bill would authorize establishment of shipper's councils to mutually consult and exchange information within such councils themselves or between such councils and or with carriers or carriers' conferences on general rate levels and services. Section 8(a)(1) provides exemptions from anti-trust laws for such activities.

On balance, Union Carbide supports the establishment of U.S. shippers' councils which would have as their objective an improved responsiveness of the liner industry to the international transportation requirements of U.S. shippers. There is now no on-going forum where a dialogue can be conducted to review our mutual needs and to resolve mutual problems. As a result, there is almost an adversary relationship between shippers and conferences. We do not envision shippers' councils as a power base to leverage carriers into a box. Nor could we accept or endorse the concept of U.S. shippers' councils as a quid pro quo for closed conferences. However, with the proliferation of general rate increases, currency surcharges, bunker surcharges and general rate levels, shippers' councils could be the vehicle for discussion and mutually acceptable resolution of these issues. Individual rates for one or a small segment of shippers should not be addressed by shippers' councils.

We are not prepared at this time to define the scope, configuration or organization of a council but we believe its eventual success would depend on this definition. The councils will have to be more than just a debating society for ineffectual complaints about conference increases. They should be well-funded and supported by people knowledgeable in the shipping community.

We do not believe that large shippers would dominate shippers' councils in the United States to the detriment of small shippers, although large shippers would naturally assume a leadership role in establishing and participating in such councils. However we would not characterize such leadership as domination nor would we expect it to be detrimental to small shippers. Rather the collective strength and knowledge should benefit small and large shippers alike.

Incorporating the suggestions noted here, we believe the enactment of S. 1593 would be a major step toward revitalizing our liner industry in support of U.S. international trade. The comments and recommendations we have made today are in the spirit of contributing to that revitalization and the growth and development of our foreign trade. Thank you.

Union Carbide pledges to work further with the Committee on this important issue. I will be glad now to answer any questions you may have.

STATEMENT OF NORTH AMERICAN VAN LINES, INC.

North American Van Lines, Inc., is engaged in the business of transporting and forwarding household goods throughout the Free World, and transporting and arranging for the transportation of commodities within the continental United States and adjacent foreign countries. North American operates domestically as a motor common and contract carrier, an air freight forwarder, an exempt surface forwarder of used household goods, and as a motor carriage broker (through a subsidiary); internationally, North American conducts operations as an air freight forwarder and as a non-vessel operating ocean carrier of used household goods. North American, through its motor carrier broker subsidiary, intends to file with the Federal Maritime Commission (FMC) an application for an ocean freight forwarder license.

North American appreciates this opportunity to provide the Commission with its comments on S. 1593. North American supports the amendments contained in Section 11 of the bill, and through its comments will refute the twin specters of unenforceability and abuse various parties have mounted in opposition to its passage.

The two common complaints raised against the amendments contained in Section 11 are that they will "open the way for 'all sorts of phony freight forwarder relationships,'" and that "it would be impossible for the FMC staff to come anywhere near policing (millions of shipments per year)" it would have to investigate if the bill were to pass.[1]

The latter objection is used by opponents of the legislation to support the former objection. In their view, "dummy forwarder" operations will spring from the amendments because the prohibitions in the amendments will be unenforceable. As North American will show, however, the claim of unenforceability is without foundation, and the fear of phony freight forwarder relationships, therefore, is baseless.

The first flaw in the enforcement argument is its overbreadth. If "dummy forwarder" operations were established, the FMC would not be forced to examine "millions of shipments"; rather, it would be able to direct its enforcement efforts toward those operations. The correct focus is on individual forwarders and not on individual shipments, and the enforcement burden raised by these parties is, therefore, illusory.

The second major flaw in the opposition's enforcement argument is the FMC's asserted lack of manpower to ferret out illegal practices. The FMC will have two able bodies of "deputies"—ocean freight forwarders and ocean common carriers—to assist it in its enforcement role if the amendment becomes law. Under the Senate bill [Section 12(a)], a member of either group may file with the Commission a sworn complaint alleging a violation of the Shipping Act of 1981.

Both groups would have strong incentives to avail themselves of this public enforcement option. If the intensity of their opposition is any measure of the vigilance with which freight forwarders guard their existing business, they, on the one hand, will actively protect against abuses in the industry. Ocean common carriers, on the other hand, will take care to avoid the payment of any monies that by law may be held to constitute illegal rebates.

Taken together, both flaws reveal the emptiness of opponents' predictions that the prohibitions could not be enforced by the FMC. Without this factual predicate, the prophesy that the bill will spawn great numbers of spurious freight forwarder operations fails as well.

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[1] "American Shipper." September (1981), pp. 28 and 30. Statements of Raymond P. deMember, Executive Director of the International Association of Non-Vessel Operating Common Carriers, and Gerald Ullman, attorney for the New York Foreign Freight Forwarders & Brokers' Association, Inc., respectively.

The foregoing reflects North American's view that passage of the bill as written would not result in the dire consequences predicted by those who oppose the legislation. Admittedly, this view is the logical complement to the extreme position (i.e., absolute prohibition of shipper-affiliated ocean freight forwarders) advocated by opponents of the amendments. The two stances are not mutually exclusive, however; rather, the Committee has available to its alternatives that would dispel the fears of opponents to the amendments and, at the same time, introduce desired competition into the ocean freight forwarding industry.

For example, the Committee could simply make permanent the amendment to the Shipping Act of 1916 effected by Section 1608 of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35. This would reserve to the FMC authority to continue licensing and regulating ocean freight forwarders. Under a new scheme of regulation, the FMC could easily retain its existing requirement that applicants for licenses disclose all affiliations with shippers, and by thus identifying potential abusers of relaxed regulation lessen its enforcement burden.

Another alternative would be to include in S. 1593 (or to reserve to the FMC rulemaking authority to promulgate) a restriction prohibiting ocean common carriers from paying to freight forwarders commissions on any shipments prior to the freight forwarder's certification in writing that he has no beneficial interest in the shipment. Compare H.R. 4374, § 5, 97th Cong., 1st Sess. In addition to creating a deterrent to the solicitation and receipt of illegal brokerage payments, such a measure would provide the FMC with an evidence trail in the event it instituted an investigation of a freight forwarder's operation.

In sum, North American supports the amendments set forth in S. 1593 as written and would urge the Committee to guide the bill through the Senate to passage. However, North American recognizes that there are those who have difficulty dealing with the prospect of such a sudden and expansive relaxation of regulations. Accordingly, North American supports the mentioned, less sweeping changes to the Shipping Act of 1916 that would allay the fears of those who oppose any measure of reform, and yet allow an infusion of much needed competition into the ocean freight forwarding industry.

STATEMENT OF ROLF O. GULLANS, GENERAL MANAGER OF DISTRIBUTION OPERATIONS FOR INTERNATIONAL PAPER COMPANY

My name is Rolf O. Gullans. I am General Manager of Distribution Operations for International Paper Company whose headquarters are located in New York, New York. Our producing mills are located in the states of Maine, New York, South Carolina, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Oregon. In addition we own and operate packaging and other converting plants throughout the United States. International Paper Company is engaged in manufacture and distribution of forest products including the exporting of such products at the annual rate of half billion dollars. These exports are transported predominantly via liner ships. The proposed Shipping Act of 1981 deals with liner shipping and we have great interest in such legislation and the benefits for American exporters and carriers which may flow out of such an Act. There are four major provisions of this proposed legislation to which we address our remarks for the consideration of the legislators. These follow:

I. CLOSED CONFERENCES

We see no benefit to the conference, its members, or shippers from a system that allows conferences to limit their membership. Conversely, we see arising from closed conferences the possibility of "exclusive club" situations, which stifle trade. The bill should therefore exclude its present provision under Item 7 of Section 4 Subparagraph (a) which reads: "limit, in the case of conferences, membership."

II. INTERMODAL AUTHORITY

We support the idea that carriers, whether within a conference or without, should be in a position to make thru-rates by working out agreements with inland carriers and to offer such single thru-rates to the user. However, it is imperative that the ocean portion of such a thru-rate be published by the maritime carrier. By ocean portion, we mean the amount of the maritime carrier's share in the arrangement with the inland carrier. We oppose secret division of revenue between inland and ocean carriers because of the obvious possibilities of discriminating practices. Shippers must retain the opportunity to arrange their own inland transportation and to be able to obtain competitive ocean shipping rates.

III. SHIPPERS' COUNCILS

We read the text of S. 1593, specifically Section 4, Subparagraph (c), Items 1, 2 and 3, as meaning that the shippers' councils may be formed for the purposes of joint negotiating of freight rates and joint arranging of required services (including maritime shipping services). It is essential that the strength of shippers' councils not be diluted through any other interpretation.

Shippers' councils need immunity to counteract potential abuses which may flow from the immunity granted the conferences. Specifically, the authorized conference activities such as described in Section 4, Subparagraph (a), Items 1, 4 and 5 of the bill should also be granted to the shippers' councils:

> "(1) discuss, fix, regulate, and agree upon rates, surcharges, accommodations and other conditions of services;
>
> "(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;
>
> "(5) engage in exclusive, preferential, or cooperative working arrangements;"

Amongst the six laudable objectives listed in Section 2, the one numbered 3 would not be achievable except for the Bill's provisions authorizing a strong shippers' council. Objective 3 reads as follows: "to assure ocean transportation rates and practices for United States exporters and importers that are internationally competitive, and which are not unjustly discriminatory;"

Cartels tend to stimulate discrimination. An available counterbalance for the shipper against whom carriers may discriminate is a shippers' council. Of course, shippers' councils themselves should not be permitted to discriminate, and appropriate regulation of the councils would be in order.

IV. INDEPENDENT ACTION

We believe that independent action should be specifically defined in the bill (under Section 3) so that there is no misunderstanding as to what action is authorized. Authorization of independent action should be included amongst authorized activities in Section 4, Subparagraph (a), so that it will be clear that this right of independent action by a carrier cannot be prohibited or diluted by the conference. The current definition of independent action which is being used and which is suitable is: Each of the carriers within a conference shall have the right to alter for itself any rate, charge, classification or related tariff matter excluding surcharges upon first giving the conference office and the other carriers within said conference at least 48-hours advance notice.

FEDERAL MARITIME COMMISSION,
Washington, D.C., May 13, 1981.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: You recently asked the Federal Maritime Commission for its views of S. 125. Since I did not agree with the response of the then Chairman, I had him indicate in his letter to you that I would at a later date give you my own views on this legislation.

As you will gather from my comments below, I find many of the principal provisions of this legislation objectionable. The reason for this is that the whole thrust of the bill tends to meet the demands of the carrier industry, but loses sight of the impact that these provisions would have on our economy as a whole. We are not just dealing with our merchant marine when we pass such legislation, but with the cost and efficiency of our foreign commerce. At a time when we are seeking to expand our exports and to hold down inflation by reducing the cost of imports, we must not sacrifice these broad economic goals. Our merchant fleet is obviously important, but to the extent that it needs government support this should be done openly and directly, not by excessive interference in our competitive ocean services market. Such a method provides a hidden subsidy paid by everyone but the cost of which is obscured. A number of provisions of this legislation would have that effect. I have dealt with some of the more important problems presented by this legislation below.

(1) DETERIORATION OF FMC'S TRADITIONAL IMPARTIALITY

Section 101(a)(2) declares that one of the objectives of our regulation is to encourage "carriage by vessels of United States registry of a substantial portion of the waterborne export and import commerce of the United States . . ." Clearly this is a worthwhile goal for the United States. But a quasi-judicial regulatory body seeking to regulate in a fair and impartial fashion the carriage of goods between our country and other sovereign countries and the carriers of other nations cannot carry out that function by having a statutory obligation to favor our U.S. shipping industry. It is difficult enough for the United States to maintain a unilateral regulatory control program over international shipping without undertaking to use it to further our merchant fleet. Furthermore, how would this work? If we had a dispute between a U.S. flag carrier and a foreign carrier covering cargo rights, would we automatically favor the U.S. flag carrier? In 1961 the United States wisely decided to separate our maritime promotional and regulatory functions. This decision should not be confused and distorted by a provision such as that contained in Section 101(a)(2).

(2) PRIMA FACIE APPROVAL OF MANY ANTICOMPETITIVE AGREEMENTS

The bill accepts as desirable the existing international ocean transport regulatory system where competitors can jointly set their own rates, but makes the system even less competitive by weakening the restraint applied by the Federal Maritime Commission, already weak, on joint carrier anticompetitive agreements and activity. It does this by requiring approval of anticompetitive agreements if they meet the "declaration of policy or other provisions of the Act" (Section 304). Then Section 305 states that if an agreement is one "implementing intergovernmental maritime agreements," is a conference agreement providing for "independent action" or is an agreement endorsed by shippers' councils in the trade, it is "presumed to be consistent with the declaration of policy and other provisions" of the Act. In short, such agreements would, in most cases, have to be approved by the Commission. There is much mischief in these provisions.

The Commission has had many agreements before it that purport to implement bilateral maritime agreements. There have always been serious issues of fairness and preservation of competition in these interstitial agreements. They are agreements between incumbent carriers. There should be no presumption that they are approvable. If the terms of these agreements are required by the bilateral the Commission would obviously follow the bilateral. But more commonly they extend their anticompetitive arrangements well beyond the authorization set forth in the bilateral. With the likely growth of bilateral agreements, it is essential that carriers not be allowed to do as they please whenever an agreement between them purports to "implement" a bilateral.

It is also unwise to, in effect, weaken the Commission's authority to scrutinize conference agreements because they permit a member line to take independent rate action. Many conference agreements and their amendments deal with anticompetitive arrangements that need control that are unrelated to rates. Such a provision would also enable any conference agreement to be approved by simply including such an independent action clause even if none of the members intended to use it.

Similarly, shippers' council approval of an agreement doesn't mean that it has passed muster and contains no anticompetitive problem. The councils may be dominated by one type of shipper and not protect other shippers. Or they may not understand the anticompetitive import of a conference action. Other interests could be affected, e.g., port localities, forwarders, and the like, interests not affecting the shippers. Section 305 is a large step in the wrong direction.

(3) PERPETUATION OF PRESENT CONFERENCE RATEMAKING SYSTEM

The prices of U.S. international ocean shipping are set, in the main, by competing carriers in the so-called freight conferences. S. 125 would continue this system and, as indicated, would, in some instances, strengthen it. It can be argued that the United States should entirely outlaw such price-fixing arrangements in its ocean trades. This would cause grave international repercussions, however, and present serious enforcement problems for our Justice Department. A better course of action would be to work to free up these organizations. We already require that conferences be open to any carrier. This bill continues that policy. But it is a frequent complaint of member lines, especially U.S. carriers, and of shippers, that many conferences are too unresponsive to outsider price and service competition. The conference system could be made much less rigid and restraining if each member were given the inherent right of independent rate action. The so-called Omnibus Bill of the last session (H.R. 6899, Section 207(b)(2)) required that such right be included in any conference agreement.

I would also leave the dual rate spread (see Section 313(8)) as it is or do away with it entirely. Expanding it only adds to the power of conferences. The real question is whether dual rate contract authority should continue to be tolerated. It is hard to think of any other industry in the United States that allows a group of competitors to band together to set prices and then authorizes them to charge customers who do not consistently utilize their services more than their other customers. It is a system of dubious value to the carriers since it doesn't work very effectively. But to the extent it does work it is obviously harmful to our shippers who are impeded in their free choice of carrier.

(4) TARIFF RATE ENFORCEMENT

Since 1961, the Shipping Act has required that the FMC enforce carrier and conference tariffs, i.e., proceed against any carrier that charges a shipper less than specified in its tariff. This anti-rebating legislation was justified on the basis that it prevents rate discrimination between shippers and inhibits "cutthroat competition" between carriers. There are arguments on the other side of the issue. Some commentators contend that this government surveillance over rates inhibits rate competition, thus increasing the cost of our exports and imports. What is clear is that the program is largely ineffective in preventing shipper discrimination. Rebating is common. Shippers are favored by special commodity rate classifications, leading to a huge variety of commodity descriptions in tariffs. Intermodal container carriage has opened up substantial opportunities for surreptitious ratecutting without fear of apprehension by payment of inland charges by the ocean carriers. Reduced FMC budgets have made enforcement of the anti-rebating program feeble. All in all, it would appear to be a sensible reduction of unilateral regulation by the U.S. to eliminate this rate enforcement program (Sections 407-9). Conferences would be left to enforce among their members their own tariff rates.

Filing with the Commission should probably continue to be required and the Commission should continue to provide a forum for any shipper claiming unfair discrimination.

(5) ANTITRUST AMENDMENTS

There has been more confusion than is desirable about the dividing line between FMC and Antitrust Division jurisdiction. The problem has been that activity viewed as covered by an anticompetitive agreement approved by the FMC and hence exempt from the antitrust laws, has not been so viewed by the Antitrust Division. There is always such a problem of demarcation between permitted and prohibited activity in domestic business. But there does seem some justification for trying to alleviate the confusion here. The enforcement is against foreign carriers as well as U.S. ship operators. Enforcement by the Antitrust Division tends to be much more effective against the U.S. carriers than the foreign carriers leading to unfair discrimination. Such enforcement has also resulted in strong resistance from foreign governments. Section 316 of the Act would exempt from Antitrust Division enforcement, activities that should be approved by the FMC even if they have not been so approved.

While this is a weakening of antitrust enforcement, particularly by eliminating private treble damage suits, in balance it would appear to be desirable in this international arena. The FMC, though also acting unilaterally, is more broadly accepted as an enforcer by foreign governments and carriers and, of course, has a far less technical approach to competition issues. I believe this approach should be tried for a three year trial period. This will test how effectively the FMC will measure up to its pro-competition responsibilities under such an arrangement.

(6) "DEREGULATION" OF DOMESTIC SHIPPING ACTIVITIES

The Commission has various authority governing domestic businesses involved in shipping that should be curtailed.

Ocean Freight Forwarders.—The Commission has licensing and bonding authority and also broad regulatory authority, in the main not exercised, over ocean freight forwarders. This is perpetuated by Sections 601-605. This is a rough-and-tumble business. But licensing is not effective in keeping up the quality of the participants. I would recommend dropping all FMC involvement except the bonding requirement. This would put forwarders in substantially the same position as any other local businesses. (Extending bonding to non-vessel operating carriers is also desirable.)

Offshore Domestic Carriers.—The Commission has rate-making authority over offshore domestic carriers, principally between the mainland and Hawaii, Puerto Rico and Alaska. In some of these trades there is virtually no competition while in others the competition is lively. In re-arranging the Shipping Act, S. 125 has continued this authority in Title XI. In considering shipping regulation reform, the Congress should give the Commission authority to exempt a given domestic trade from regulation after hearing. This will enable it to experiment with deregulation of a trade in which it appears there is enough market competition to protect the noncontiguous area served from market abuses.

Terminals.—The Commission presently exercises jurisdiction over ocean terminal activity. It approves agreements between terminals or between carriers and terminals, thereby exempting them from the antitrust laws. The Commission requires that terminal tariffs be filed and be just and reasonable. (Its authority to do so is dubious. It is based on the second paragraph of Section 17 of the 1916 Act.) S. 125 continues the status quo on this authority (Sections 102(17), 301(a) and 506). I would specifically remove these activities from FMC jurisdiction and allow these domestic businesses to compete with each other and have them subject to the antitrust laws. The only power I would retain for the Commission is to provide a forum if it is contended that a terminal's rates or practices are discriminatory or detrimental to the foreign commerce of the United States.

(7) EXEMPTIONS

Section 701 continues the Commission's present exemption authority. That authority has been said to be very limited due to the legislative history surrounding its original passage (some claim it is limited to correcting technical errors and the like). By further legislative history or a specific provision it should be made clear that the exemption authority is broader than that. Selective deregulation experiments should be available to the Commission under this provision.

(8) INTERGOVERNMENTAL AGREEMENTS

I think it unwise to specify by statute the terms of bilateral maritime agreements (Sections 901–903). For one thing, this tends to suggest that an agreement meeting these criteria is desirable and is acceptable to the United States. I would hope our Government would avoid such agreements in the future to the greatest extent feasible and, if it does not, that it would provide much more complete safeguards for competition in the agreements. In any event, our statutes shouldn't give foreign governments a blueprint for such future negotiations.

The Maritime Industry Advisory Committee proposal in Section 902 is totally unacceptable. By having six of the persons on the Committee from the carriers and their unions, it assumes that the principal parties concerned with a bilateral maritime agreement are the U.S. carriers. That is not so. These agreements have importance for our whole economy. Such a parochial approach leads to distortions as to the true significance of such agreements. When negotiating such an agreement it is better to have the Executive Branch receive input from the shippers and carriers actually involved in the trade covered by the agreement, on an ad hoc basis.

Conclusion.—There are a great many other, less serious problems raised by the various provisions of S. 125. I will not burden this letter with those details. If it appears that this legislation is going to move forward, however, I will be pleased at that time to submit section-by-section comments that will cover these lesser points.

Sincerely yours,

PETER N. TEIGE, *Commissioner.*

SYLVAN SHIPPING CO., INC.,
Stamford, Conn., September 17, 1981.

Hon. SLADE GORTON,
Chairman, Senate Merchant Marine Subcommittee,
Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR GORTON: My name is Charles S. Cumming and I reside at 11 Old Town Lane, Halesite, New York. My business address is 1177 Summer Street, Stamford, Connecticut. I am presently employed as an Assistant Manager of Sylvan Shipping Company, a wholly owned subsidiary of ITT Rayonier Inc. I have been involved in the maritime industry as a student, ship's officer, and shoreside worker since 1965. Sylvan Shipping Company operates a common carrier liner operation specializing in the carriage of forest products.

I wish to express my views and those of my employer on Senate Bill S. 1593 which seeks to revise regulation of international liner shipping operating in the United States foreign commerce. Our specific comments will deal with Section 7 of the Bill which covers "loyalty contracts." Therefore, the following is submitted as written testimony for your review and consideration.

Under U.S. Law, anti-trust immunity may be granted where valid reasons exist for competing businesses to group together. The formation of reciprocal exchanges in the insurance industry is an example. The anti-trust immunities granted under the Shipping Act and the proposed changes are therefore not unique. It is not our intent to debate the merit or validity of the reasons for the protections granted under the existing Shipping Act or Bill S. 1593. The questions we wish to address involve the extent of the immunities to be granted in Section 7 of the proposed act.

Dual-Rate or Loyalty Contracts may provide significant benefits for both shipper and carrier. Shippers, in return for a guaranteed share of their cargo volume, can realize significant reductions in freight expense. Carriers, in return for a discount, can assure themselves of efficient utilization of their tonnage through guaranteed shares of certain shippers' cargo volume. As desirable as these goals are, it is obvious that without certain legal restraints these contracts could be seen as powerful tools to be used in restraint of competition and/or trade. In fact, this is the reason Section 14(b) of the present act exists.

The most significant change proposed in Section 7 of the bill is the elimination or drastic curtailment of F.M.C. review procedures. The current bill makes no provision for Commission review of a loyalty contract. The contract must be filed, apparently, but as long as the details of the section are followed, the contract is in effect as written. The section is silent on Commission power to cancel contracts deemed detrimental to U.S. Commerce or the public interest. As long as the provisions of Section 7 are contained in the contract, the Commission appears powerless to declare the contract void in spite of any additional questionable language. The omission of review and cancellation powers of the Commission in the proposed act offers wide latitude for possible anti-trust abuses and ample opportunity for other government agencies to insinuate themselves into maritime affairs.

In at least two other areas, the section opens the act to similar criticism. Section 7, Para. a(4) explicitly places the burden of proof in contract disputes on the shipper. This many be seen as a maneuver to allow one of the parties to the contract to exert undue influence on the other. This situation would be at odds with the traditional concept that the parties to a contract deal with each other as equals. The potential for abuse seems obvious. Section 7, Para. a(9) provides for the "spreads" in the contract to be "commercially determined." While the intent behind this change in the existing law is admirable, the elimination of Commission review could be seen as leading to questionable practices.

Not all our criticism is adverse. We wholeheartedly support the language in the bill which excludes "bulk" cargoes. This clause would delete the old wording which attempts to limit the definition of bulk commodities.

In summary, we are of the opinion that in spite of the need for changing our body of shipping law, we should not eliminate entirely the review of business relationships by a competent authority. The Shipping Act, 1916 and the Bill S. 1593 grant statutory immunity to shippers and carriers from prosecution under anti-trust acts. By removing the restraints under the old law which relied heavily on the Commission's ability to review and act, while maintaining the immunities from other laws, the proposed bill can and will lead to conflict between government and industry and will ensure the need for reform in the future.

One of the major problems we face as an industry today is the ongoing conflict between the Department of Justice and the Federal Maritime Commission. The industry cannot afford to follow two masters. Section 7 of the proposed bill does not, unfortunately, help to clear up the present ambiguity, it only guarantees that it will continue.

We hope that the comments we offer will aid you and the committee to finalize legislation that will serve the needs of U.S. foreign commerce in a most effective way. We thank you for your time and consideration.

CHARLES S. CUMMING

SEPTEMBER 21, 1981.

Hon. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine, Committee on Commerce, Science and Transportation, U.S. Senate.

DEAR MR. CHAIRMAN: The governments of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, and the United Kingdom have requested that the Department convey to you the comments contained in the enclosed aide memoire, dated September 18, 1981, on S. 1593, a bill to revise regulation of international liner shipping operating in the United States foreign commerce.

Sincerely,

RICHARD FAIRBANKS,
Assistant Secretary for Congressional Relations.

Enclosure.

AIDE MEMOIRE

The governments of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden and the United Kingdom ("the governments") wish to bring to the attention of the State Department their views on the Bill to revise regulation of international liner shipping operating in the United States foreign commerce (S. 1593), introduced by Senator Gorton on 3 August 1981.

The governments attach great importance to maintaining good relations with the United States in the maritime field. They regret that, for a number of years, disagreement on the regulation of international shipping practiced by the United States has been a source of friction between the United States and its major maritime partners. Serious problems have arisen owing to the uncertain scope of the anti-trust immunities applied to shipping, to the burden imposed by complex Federal Maritime Commission (FMC) regulation, and to the unilateral application of this system, outside U.S. territorial jurisdiction, to an international trade in which many other nations besides the United States have an equal interest.

Against this background, the governments welcome the offer by the Department of State of discussions between interested OECD member states with a view to the development of common maritime policies, and the acknowledgement by the U.S. Secretary of Transportation, in his letter to Senator Gorton on 17 July, of the need for legislation to revise the regulatory policies in the 1916 Shipping Act. Similarly they welcome the attention the U.S. Senate is paying to these important issues and the approach to reform set out in S. 1593.

While recognizing that the Bill would not eliminate the unilateral application of U.S. laws to international shipping, the governments warmly welcome and share its major objectives. They believe that if legislation along the lines of S. 1593 is enacted into law and subsequently administered with imagination and sensitivity, it would solve many of the problems which have caused friction between the United States and its major trading partners in the past and would improve the performance of all shipping in the U.S. trades.

Specifically, the governments welcome the following features of the Bill:

(a) Its declared policy (Section 2(1)) of developing and maintaining an efficient ocean transport system through commercial means with minimum government involvement. The governments strongly support a non-protectionist maritime policy based on commercial criteria and the maximum possible self regulation by the shipping industry.

(b) Its delcared policy (Section 2(4)) of harmonising United States shipping practices with those of its major trading partners. The governments welcome this recognition of shipping as an international activity which affects all countries involved.

(c) Its clarification of anti-trust immunities. The governments particularly welcome Senator Gorton's statement in introducing S. 1593 that the aim of the Bill is to give conference activities complete anti-trust immunity, although they are concerned that the Bill, as drafted, does not make it clear that any violations will be subject to Shipping Act penalties only. The governments very much agree with Senator Gorton's view that complete antitrust immunity would remove a constant irritant between the US and its foreign trading partners.

(d) Its proposed legalisation of rationalised conferences (Sections 2(5) and 4(a)) as a means of ensuring stability in US foreign trades. The governments have long argued that such conferences would benefit all shipping in the U.S. trades by reducing costs. The governments also believe that rationalised conferences cannot acquire monopoly power as long as the trade remains open to competition from nonconference lines.

(It is also important that conferences should be able to compete fairly with nonconference lines and section 12(a)(9) may be too restrictive in this respect). The proposed anti-trust exemption for intermodal agreements (Section 8(1)) would also allow both US and foreign carriers, and thus their customers, to obtain the fullest benefits from modern container development.

(e) Its provisions for the operation of shippers' councils. The governments consider such councils valuable in giving shippers an influence over rates and conditions of service.

(f) The reduction of the regulatory burden and the stress throughout the Bill on minimal government involvement. The governments particularly welcome the provisions for a strict limit on FMC decision making (although consideration could also perhaps be given to giving agreements provisional approval within 45 days, unless a complainant can prove substantial harm); the abandonment of the "Svenska" approval standard in favour of simpler and clearer criteria; and the placing of the burden of proof on the opponents of an agreement (Section 6). The governments would also hope the burden of proof would be on complainants under Section 13.

(g) The recognition in the Bill that the question of independent rate action should be one for negotiation within a conference.

The governments would be happy to provide any further elaboration of the above points if this would be helpful. They also hope there will be an opportunity for them to provide more detailed comments on the Bill at a later stage. They would however like to note that the Bill would not eliminate their jurisdictional concerns which cause considerable friction between the United States and its foreign trading partners.

The governments believe it is urgent to reach a common view on mutually acceptable limits to the territorial reach of each country's jurisdiction over shipping. In particular, the governments are anxious to ensure that non-U.S. shippers councils can operate without restriction in U.S. trades and that their carriers will not suffer tariff suspension when production of non-U.S. documentation is prevented by their blocking statutes (Section 14).

The governments would be grateful if the Department of State would convey their comments to the Senate Committee on Commerce, Science and Transportation to which S. 1593 has been referred. They would also be grateful if the Administration would take account of these views when it formulates its own position on the Bill.

WASHINGTON, D.C., *September 18, 1981.*

EMBASSY OF GREECE,
Washington, D.C., October 15, 1981.

[MEMORANDUM]

"Greece has not participated in the recent demarches by the member countries of the Consultative Shipping Group (CSG) on the bills introduced by Messrs. Gorton and Biaggi, because she does not share the positions advanced in the aforementioned demarches concerning closed conferences.

More specifically, Greece believes that closed conferences hinder free competition in regular lines as well as the right of shippers to use maritime transport services of their choice at the most profitable cost.

Nevertheless, Greece shares the opinion that an exchange of views between the United States and the CSG countries would be constructive before the U.S. Administration reaches final decisions on subjects of maritime policy."

ASSOCIATION OF AMERICAN RAILROADS,
Washington, D.C., September 29, 1981.

HON. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine, Senate Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On August 3, 1981, you introduced S. 1593, the Shipping Act of 1981. The Merchant Marine Subcommittee held hearings on S. 1593 on September 21, 1981. The Association of American Railroads (AAR) would like to express the concerns of the railroad industry with the wording of one relatively minor provision in that bill.

On March 23, 1981, the Interstate Commerce Commission exempted intermodal service performed by a railroad from regulation under Title 49 of the United States Code. This action was taken under broad discretionary authority delegated to the Interstate Commerce Commission by the Congress in 49 U.S.C. § 10505. Subsequent to that action, the Federal Maritime Commission on March 25, 1981 (46 F.R. 18549) declared that tariffs containing rates for through rail/ocean transportation involving railroad movements within the United States may thereafter omit the charge to be collected by the water carrier for the port-to-port portion of the tariff—the result being that the rail portion of the through rate would no longer be discernible. From the railroads' point of view this action was entirely apporopriate since the railroad rate had become a private contractual matter between the railroad and the ocean carrier.

Section 9 of S. 1593 contains language which could be interpreted as reversing the FMC action of March 25, 1981. Section 9 currently requires the filing of tariffs with the FMC showing an ocean carrier's "rates between all points on its own route and on any through transportation route". Further, such filings must include any "document evidencing the transportation agreement". To assure the application of this language in a manner consistent with the FMC decision of March 25, 1981, we propose adding the following proviso to Section 9: "*Provided*, That, ocean common carriers shall not be required to state separately or otherwise reveal the railroad portions of a through intermodal rate".

In his September 21, 1981 testimony on S. 1593, Federal Maritime Commission Chairman Alan Green, Jr., recognized the railroads' concern that Section 9 may require the revelation of railroad rates. He stated that the FMC shares this concern and does not wish to expands its jurisdiction into this area. Our proposed amendment to Section 9 should adequately address this shared concern.

The AAR urges the adoption of its proposed amendment by the Subcommittee and requests that this letter be made a part of the Subcommittee's record on S. 1593.

Sincerely,

William H. Dempsey,
President and Chief Executive Officer.

ITT Rayonier, Inc.,
Stamford, Conn., October 7, 1981.

Mr. Terry Spilsbury, *Counsel, Senate Merchant Marine Subcommittee,*
Russell Senate Office Building, Washington, D.C.

Dear Mr. Spilsbury: This letter will serve to confirm our meeting on September 29, 1981 in your offices and our discussions at that time.

The meeting, which was attended by Mr. R. O'Brien of ITT, Mr. D. Bane of ITT Rayonier, and myself, was both interesting and informative. In brief, we stated our position on the following major points:

1. ITT Rayonier strongly supports the doctrine of independent action for conference members. We feel that Bill S. 1593 is not adequate in this regard.

2. ITT Rayonier does not strongly support shippers councils. We prefer as a matter of policy to deal directly with carriers.

3. ITT Rayonier and Sylvan Shipping both strongly support the licensing and bonding of independent ocean freight forwarders. We have no specific recommendation on the bonding requirement but do agree that it should be increased from the present level.

4. ITT Rayonier and Sylvan Shipping support any provisions in this bill that serve to promote and further develop intermodalism.

5. Our major concern with the legislation as a whole is that it may not end the jurisdictional disputes between the Departments of Justice and Transportation, and the F.M.C. In our estimation, one of the major problems facing shippers and carriers today is the lack of a comprehensive and unified voice from the government on the regulation of commerce. While Bill S. 1593 seeks to curtail Department of Justice intervention in maritime affairs, we feel that the Bill does not deal sufficiently with the issue. It would appear that the door would still be open for repetitions of "Carnation Milk" and similar cases.

In addition to the above major points, we discussed a wide range of items, including the clarification of language. These clarifications are most important in the areas of "Bulk" and "Neo-Bulk" cargoes (Sec. 3) and claims arising out of the Act (Sec. 12).

You may enter this letter and my previous correspondence into the record as you deem necessary.

I wish to thank you again for your time and courtesy. We appreciate the opportunity to express our views and feel that we have a much better understanding of the pending legislation after our exchange. Should you desire to discuss the legislation or seek any further opinions, please do not hesitate to contact me.

Very truly yours,

Charles S. Cumming,
Assistant Manager,
Marine Sales and Operations.

Pacific-India/Pakistan/Ceylon/Burma Agreements,
San Francisco, Calif., October 15, 1981.

Hon. Slade Gorton,
Chairman, Subcommittee on Merchant Marine,
Russell Senate Office Building, Washington, D.C.

Dear Senator Gorton: The members of the West Coast United States and Canada/India, Pakistan, Ceylon and Burma Rate Agreement and the India, Pakistan, Ceylon and Burma/West Coast United States Rate Agreement wish to express their support for Senate Bill 1593 "The Shipping Act of 1981". The Bill would provide a much needed comprehensive reform and modernization of the regulation of the maritime commerce of the United States.

The Rate Agreements serve the trade, both inbound and outbound, between the West Coast of the United States and Canada and India, Pakistan, Bangladesh, Burma and Sri Lanka, and members fly both the American and foreign flags. This mix of national interests and an active trade makes sensible, predictable regulation very important if the Rate Agreements are to continue to serve their trades with regular dependable service at stable rates.

Rather than address the Bill at length, the Rate Agreements have found the views expressed in the joint statement of Pacific Westbound Conference Chairman Donovan D. Day, Jr. and Far East Conference Chairman Gerald J. Flynn to be compatible with the views of their members. The Rate Agreements therefore wish to associate themselves with and adopt as their own the views and suggestions expressed in that joint statement.

Sincerely,

H. P. BLOK, *Secretary.*

OCTOBER 15, 1981.

Hon. SLADE GORTON,
Chairman, Subcommittee on Merchant Marine,
Russell Senate Office Building, Washington, D.C.

DEAR SENATOR GORTON: The members of the Malaysia Pacific Rate Agreement, Deli Pacific Rate Agreement and Java Pacific Rate Agreement (with the exception of Lykes Bros. Steamship Co., Inc., a member of each Rate Agreement, which has chosen to express its views through other avenues and wishes to be disassociated from these comments) are grateful for the opportunity to express their views regarding Senate Bill 1593, the "Shipping Act of 1981", which is currently being considered by your Subcommittee. Individual carrier members may also have in some instances commented separately or through other organizations such as CENSA, CASO, or other conferences to which they belong. The particularized views expressed elsewhere by individual member of the Rate Agreements should not be considered as being in any respect modified by these comments.

By way of background, the Malaysia Pacific and Deli Pacific Rate Agreements are each composed of five member lines, while the Java Pacific Rate Agreement has six members. The memberships of each of the Rate Agreements are made up of both American flag and foreign flag carriers. The Malaysia Pacific Rate Agreement serves United States and Canadian Pacific coast ports from Malaysia, Singapore and Brunei. The Deli Pacific Rate Agreement serves United States Pacific coast ports from Indonesia, including the east coast of Sumatra, while the Java Pacific Rate Agreements serves United States Pacific coast ports from Indonesian ports. Each of the Rate Agreements exists and functions under authority of a Federal Maritime Commission-approved section 15 agreement which enables the member lines to discuss and agree upon rates, charges, rules and procedures within their trade. Because the Rate Agreements exist under the authority of the Shipping Act of 1916, and specifically the conference provisions of the Shipping Act of 1916, the undersigned members have a vital interest in the continuing existence and legislative evolution of conference authority.

The Shipping Act of 1981 is clearly the most important piece of legislation concerning regulation of the maritime industry since the Shipping Act of 1916 was enacted, and presents a much-needed opportunity for modernization of maritime regulation. Additionally, this important legislative initiative occurs at a very opportune time, considering the Interstate Commerce Commission's recent deregulation moves which affect containers and cargo moving intermodally and the relationship between the water and overland carriers, as well as the currently pending circuit court proceeding challenging conference authority over intermodal rates. A thoughtful revision of the maritime regulatory framework at this time will enable all of these factors to be correlated and reconciled, bringing stability to what has become an increasingly uncertain area of regulation.

Conference Activities and Approval of Agreements.—The advantages of conference membership, including the now Act's express authority to rationalize sailings between ports (section 4(a)(3)) and to pool or apportion earnings, losses or traffic (section 4(a)(2)) will be lost or considerably lessened in importance unless they may be rapidly approved and implemented. For this reason, we are pleased to note that section 6 of the Bill imposes limitations on the period of time which may be consumed by the Federal Maritime Commission's consideration and approval process. As we read section 6, all agreements must be approved unless they are found to be unjustly discriminatory or unfair or operate to the detriment of the commerce of the United States. Those standards create a presumption that an agreement is approvable unless it fails to meet those two standards. This is in line with the sense of the Congress since the Alexander Committee's exhaustive study of conference activities in 1914, and should go far in eliminating the unnecessary delays which conferences and agreements have encountered in the recent past and continue to experience today.

Especially important in the approval process are the time limits imposed. We note, however, that 180 days (plus perhaps a 90-day extension) is still quite a long period of time for action on agreements. This is especially so in the case of amendments to agreements which have been proposed to remedy an urgent problem in the conference trade or to bring the conference authority into line with commercial needs. The proposed time limits would at least eliminate the multi-year delays which some agreements have encountered. The strict time requirements and accordingly expedited processing of agreements and amendments by the Federal Maritime Commission will have the much-needed effect of enabling conference members to receive answers to their applications for authority while there is still use for that authority. Definite time limits are far preferable to indefinite delays during which the commercial need for that authority may well cease to exist or so change as to render inadequate the authority being sought. One of the more frustrating aspects of conference membership has been the inability to react quickly and in a commercially sensible manner to developments in the trade. While the maximum of nine months is still considerable, at least conference members will now be assured that they will know within that period whether their agreement has been approved or disapproved and may act accordingly.

In line with the sense of the Congress in 1916, and subsequent Congresses in amending the Shipping Act, the burden of proof has properly been placed upon a party opposing approval of an agreement. This decisive placement of the burden of proof, together with the time limitations imposed by the Act, will prevent the use of administrative agency proceedings to delay or hold hostage approval of agreements for reasons which are not based upon valid Shipping Act considerations.

Non-application of Anti-trust Law.—An extremely important feature of the new Act is set forth at section 8(a), which states that the antitrust laws shall not apply to any agreement or activity permitted in section 4. As you stated in your remarks introducing the Bill, Mr. Chairman, the original policy behind approval of the conference system has "been stood on its head by a series of decisions of the Supreme Court", and that a starting point for any legislation to revise the Shipping Act must focus on the need to restore the intent of Congress in this area. You further noted that "at the Bill's core is a grant of complete antitrust immunity to conference activities" and that the Bill would "restore the pre-*Carnation* case view that agreements for economic cooperation among carriers are considered to be the subject exclusively of the Shipping Act, and not to other antitrust laws". Following this up, you noted that the Bill thus overrules the *Carnation* and *Sabre* decisions and ensures that violators of the Shipping Act will be subject only to civil penalties provided by the new Act itself.

Although your remarks regarding the non-application of the antitrust laws to conference activities and to assessment of penalties for violations could not be more clear, we would ask that the legislative history of this Bill make clear that the antitrust laws shall likewise not apply to the approval of agreements. This clarification would be in full accord with the standards for agreement approvals set out in section 6(b) which drops the "public interest test" which was added to section 15 of the current Shipping Act in 1961 and which has since been the basis of countless antitrust based challenges. The clarification would also serve notice that the maritime industry, which is unlike any other transportation industry in its scope, effect on United States commerce, and delicate balancing of United States sovereignty versus that of its trading partners, should be regulated by the terms of an act drafted specifically to consider and deal with the realities of that industry. It should be made clear that specialized Shipping Act principles and concepts rather than domestic United States antitrust principles and concepts will be applied to ocean transportation.

In connection with the non-application of the antitrust laws to Shipping Act activities, we also support section 4(b) of the new Act. This section expressly permits conference intermodal services. Such authority, coupled with an antitrust exemption, is essential if modern developments in containerization and container handling technology are to be melded with the superior service that conferences provide. The result should be a transportation system which provides maximum flexibility to shippers and the most efficient use of land and water equipment. This logical transportation development has been impeded by challenges such as the *United*

States v. *FMC* proceeding which is currently pending rehearing en banc before the District of Columbia Circuit. Such challenges should be put to rest by the new Act.

Subpoenas and Discovery.—Sections 6(g) and 14 of the Bill greatly expand the Commission's power to obtain records and information from carriers as well as from conference offices and staff. Section 14, although derived from the Anti-rebate Bill (Public Law 96-25), which added section 22(c) to the Shipping Act, 1916, contains a very great difference. The Anti-rebate Bill, by both its terms and its legislative history, is limited to Commission-instituted adjudicatory investigations of violations involving rebates or refunds, and the discovery powers in that Act were limited to that type of offense and that type of proceeding.

Section 14 has carried over the subpoena and discovery powers of the Anti-rebate Bill to "investigations and adjudicatory proceedings under this Act" and may be used by "any party". This means that depositions, interrogatories and other discovery may be ordered by the Commission in any investigation instituted by the Commission or in any Shipping Act complaint proceeding brought by private parties against other private parties. The section apparently does not limit such discovery to Commission counsel, but rather includes the supplying of information "authorized to be obtained" by a Commission-issued subpoena or order. This would allow competitors in any Commission proceeding to seek discovery which if not produced can result in their competitor's tariffs being suspended and substantial fines assessed. The possibility of abuse is obvious.

Private party attempts to subpoena records located in foreign countries, backed by FMC sanctions, will inevitably lead to conflict with other nations. The present system has already led to foreign "blocking" statutes and the proposed language could lead to far more serious reprisals by foreign governments.

We would propose that sections 14(c), 14(d) and 14(e) be limited to proceedings concerning Commission instituted investigations of rebating, and that the sections should not be made applicable to discovery initiated by private parties.

As a further check on abuse of discovery the Committee may wish to consider limiting discovery to matters which is "relevant to the issues in the proceeding" as opposed to the present broader standard permitting discovery if it might lead to relevant evidence. This limitation should also be carried over to section 6(g), which would require conferences to comply with a "subpoena or discovery order lawfully issued by the Commission". These modest revisions would prevent Commission fishing expeditions into conference records where no violation is known or suspected. Unlimited FMC authority for access to conference records located abroad would likely be strongly resisted by the government where the office is located.

Finally, the present provision could be interpreted to the effect that if a single conference member, whether on its own or on direction of its government, does not comply with discovery the entire agreement is placed at risk. This may be so even though the non-complying carrier has little or no real interest in the proceeding.

Section 14 has two effects which we do not believe that the Committee intends. First, section 14(c) permits the Commission to suspend a carrier's tariffs following only a Commission hearing. Following such a suspension the carrier has no realistic remedy other than to cease operations while attempting to obtain an injunction or stay of the suspension pending judicial review. An improperly issued administrative tariff suspension order puts a carrier, which may have hundreds of millions of invested dollars at stake, out or business at one stroke. This power far exceeds any other agency's subpoena/discovery power.

Second, the section gives shippers far too much leverage against conferences and carriers. A shipper with an irrelevant or marginally relevant discovery demand can threaten to have the carrier's tariff suspended, while the carrier has no equivalent power to force the shipper to make discovery. These imbalances should be removed.

Confidentiality.—Effective self-policing requires the right of the independent policing body to inspect and copy (without the use of formal process) documents and records maintained by foreign ocean carriers in foreign countries. The willingness of many ocean carriers (and foreign countries) to permit this type of inspection for the purposes of U.S. regulation is dependent upon assurances that the information thus obtained will be kept absolutely confidential by the neutral body. Without such assurances of confidentiality the neutral body policing system will be unable to operate effectively in monitoring compliance with conference agreements. The concept behind a self-policing body is that it can perform functions that cannot be performed directly be governmental authority because it can obtain documents that would, under foreign law, be inaccessible to U.S. governmental authorities and agencies. If neutral body self-policing agencies could be forced to turn over such records to the Commission pursuant to a subpoena or discovery request this advantage would be lost, since ocean carriers and foreign governments might well be unwilling to cooperate with neutral bodies under such circumstances. It is vital, therefore, that the Bill permit neutral bodies to guarantee the absolute confidentiality of their files. To this end, we propose that section 14(a) be amended by adding language to prohibit the Commission from being able to require disclosure of conference records by the neutral body.

Freight Forwarders.—The Bill would significantly change the regulation of freight forwarders and, with the exception of the increased bonding requirement, we believe the changes to be undesirable. The new provision eliminates the licensing of forwarders. Freight forwarders deal with the property and funds of the public in a business which is very foreign and confusing to many shippers. The minimum protection of the public requires that the current scheme of regulation be retained.

NVOCCs.—The Bill seems to excuse non-vessel operating common carriers (NVOCCs) from tariff filing requirements, and thus also from rejection of tariffs and penalties for operating without a tariff for noncompliance with discovery or Commission subpoenas. We assume this exclusion to be inadvertent, because without tariff filing NVOCC's then will be free to deviate from their price lists at will. Because NVOCCs are carriers vis-a-vis shippers, they should be treated as any other carriers and required to file and adhere to tariffs.

Remedies.—We note with satisfaction that section 13 has corrected the unequal treatment accorded by present section 22, which allows reparations only for a violation "by a common carrier by water, or other person subject to this Act". Section 13(a) corrects this inequality by permitting actions by carriers against shippers or others.

Once again, the undersigned members of the Rate Agreements wish to express their appreciation for introduction of Senate Bill 1593, and reaffirm their support for the Bill. Just as carriers and shippers benefit from stable rates and service, they also benefit from stable and predictable regulation of those rates and services. Senate Bill 1593 would restore stability to the regulation of ocean commerce. Our intention has been to keep these remarks brief and to concentrate upon what the members feel to be the most important aspects of the Bill. In the event that further hearings are held or that further comment would be useful, we would be pleased to participate or present more detailed comments.

Sincerely,

MAERSK LINE,
BARBER BLUE SEA LINES,
EAC-KNUTSEN LINES,
AMERICAN PRESIDENT LINES, LTD.,
HOEGH LINES (J/S).

SOUTHERN STEAMSHIP AGENCY, INC.,
Mobile, Ala., October 29, 1981.

Hon. SLADE GORTON,
Chairman, Merchant Marine and Tourism Subcommittee, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: I refer you to the subject of affiliation of ocean freight forwarders and shippers, as that subject was treated in the amendment to the Shipping Act made in Section 1608 of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981. We wish to state our position strongly in favor of the principle reflected in 1608, authorized in such relationships in the circumstances there provided.

When our parent company, Ryan-Walsh Stevedoring Co., Inc. was purchased by Dravo Corporation, a company with shipper interests, we voluntarily surrendered our license, effective July 1, 1981, to comply with the technical requirements of Section 1 of the Shipping Act prior to the recent amendment of Public Law 97-35, and in reliance upon that section, we reapplied for a forwarder license and have received same effective October 5, 1981. Our existence as a forwarder therefore depends on Section 1608.

We are aware of the position taken by certain forwarders that Section 1608 should be repealed. We oppose that position. We do not believe there is any inherent reason the amendment will not work, and do not agree with the position expressed by some that it will prove unenforceable and that pre-1961 malpractices will necessarily reappear, that is, that because some shippers set up "dummy" forwarders prior to 1961, the new law will result in the same conditions again. There are basic fallacies in that argument. First, it presumes that the average forwarder will violate the law if he can. We do not accept that premise. Second, it also presumes the Federal Maritime Commission is and will be ineffectual in its oversight functions and in enforcing the law against those who overstep its boundaries. We do not accept the premise. Third, it overlooks the fact that under the present law, prior to receiving a license, a forwarder applicant must be found to be "fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of (the Shipping) Act and the requirements, rules, and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936 . . ." No such provision or requirement existed prior to the 1961 Act; and there was no restriction upon entry into the business of forwarding. The pre-1961 experience therefore is no basis for judgment as to what will happen today.

With Congress having so recently amended the law and provided in effect for a further look in 1983, it would be a mistake we believe and wholly unjustified to repeal that amendment at this time.

Yours very truly,

L. H. STUART, Jr., *Vice President.*

PORT OF SEATTLE,
Seattle, Wash., November 5, 1981.

Hon. SLADE GORTON,
127D Russell Senate Office Building, Washington, D.C.

DEAR SENATOR GORTON: I am pleased to offer the following comments on S. 1593, the Shipping Act of 1981, on behalf of the Port of Seattle. The Port of Seattle shares your belief that there is a "need to inject commercial standards and market mechanisms into every facet of our liner shipping policy to the extent that they will work as well or better than direct regulation." We view S. 1593 as an effort to achieve this goal. We are confident that you share our belief that the ports of the United States are a vital link in the foreign and domestic waterborne commerce of the United States, and that regulation of terminal owners and operators must be considered in formulating any United States' liner shipping policy.

Our comments on S. 1593 concern four areas. First, we believe Federal Maritime Commission regulation of agreements between terminal operators or ports and others subject to the Act should be minimized. Second, we support S. 1593 insofar as it eliminates the requirement that port tariffs be filed with and reviewed by the Commission. Third, we recommend that Sections 6(b), 7(a)(5), and 12(a)(11) be modified to clarify that carriers are free to charge rates and engage in practices which reflect the economic efficiencies of intermodal transportation. Finally, we are concerned that Section 11, which seems intended to deregulate the freight forwarding industry, may have deleterious effects on commerce. We favor a more open entry policy in the forwarding industry, but believe the Maritime Commission should still have the responsibility to assure the shipping public is protected. Thus, a licensing requirement should be maintained, and Commission discretion allowed as to the amount of bond required.

1. AGREEMENTS

Under current law, terminal operators and owners, which are "other persons subject to the Act," are required to submit to the Federal Maritime Commission contracts they enter with other persons subject to the Act. As with other Section 15 agreements, once approved, these agreements are "exempt" from the application of the antitrust laws.

Unlike other Section 15 agreements, most agreements pertaining to the lease and utilization of terminal facilities do not concern activities which are violative of the antitrust laws. Most are routinely approved. But, the uncertainty over whether an agreement is between two parties subject to the Act, and whether the activity covered by the agreement is subject to the regulation by the FMC, has led to a standard industry practice of submitting to the Commission virtually every agreement entered into by a port which is arguably subject to Commission jurisdiction. This has resulted in unnecessary expense both for the ports and the government, and, at times, unnecessary delay in implementing commercial contracts.

While a very small number of agreements submitted to the Commission may need review before approval, we do not believe that is true for most terminal-use agreements.

Accordingly, we would suggest that terminal agreements be deemed approved upon filing with the Commission, subject to subsequent disapproval only after hearing and upon complaint of a shipper, carrier or other port, or upon the FMC's own initiative. This would alleviate the delay and associated expense for most agreements which results from the approval process, but, at the same time, provide a mechanism for Commission review where necessary.

2. TARIFFS

Under current law, ports are required to file at the Federal Maritime Commission tariffs covering services rendered in connection with common carriers. While there has been minimum "rate regulation" of ports and terminal operators by the Federal Maritime Commission, it is our belief that the costs associated with the tariff filing system exceed its usefulness. S. 1593 implicitly eliminates tariff filing requirements for ports and terminal operators. We urge this concept be retained in any final legislation.

If the Commission is persuaded that there are valid reasons for maintaining a tariff regime, we would urge that it be limited to a filing and adherence requirement, with no rate regulation. Terminal rates should not be regulated by the Federal government, for instance, to assure that they are nondiscriminatory, compensatory, or reasonable. The workings of the marketplace can best assure that rates are set at a proper level.

3. NATURAL ROUTING OF CARGOES

Section 7(a)(5) of S. 1593 provides that dual rate contracts may not require a shipper "to divert shipments of goods from natural routings not served by the carrier or conference where direct carriage is available." Section 6(b) provides the Commission shall disapprove any agreement found to be, inter alia, unjustly discriminatory or unfair as between ports. Section 12(a)(11) prohibits common carriers from charging rates which are found to be "unjustly discriminatory between shippers or ports." We are concerned that these three provisions of the Act can be utilized by litigants before the FMC to hinder the full development of an intermodal transportation system. In the name of port protection, the regulatory concept has been developed by the FMC that carriers' pricing decisions which attract cargo from areas "naturally tributary" to one port for routing through another port are unjustly discriminatory. This concept had its genesis in Commission decisions interpreting Sections 16 and 17 of the Shipping Act, 1916 in conjunction with Section 8 of the Merchant Marine Act, 1920.

We do not believe carriers or shippers should be forced into outdated and economically unsound shipping practices in the name of "port protection." S. 1593 should be amended to provide that rates and practices are not to be found unjustly discriminatory by the Commission simply because they result in changes in transportation patterns. Only when pricing decisions are not economically justified or result from the monopoly power of a conference should they be prohibited.

4. FREIGHT FORWARDERS

The Port believes that continued regulation of the freight forwarding industry is desirable. Section 11 of S. 1593 would eliminate the current licensing requirement and instead mandate a bond of $150,000. We disagree with this approach for two reasons. First, the intent of this change in law is apparently to ease entry into the freight forwarding business. However, the statutory amount of the bond is likely to serve as a serious barrier to entry into the freight forwarding business. Indeed, the requirement of $150,000 in coverage could cause many existing companies which provide valuable services to cease operating. The Commission should have the discretion to set the levels of bonding for different companies. There should be unrestricted entry; however, a licensing requirement should be maintained in order to assure the basic competency and integrity of individuals or corporations acting as freight forwarders.

Finally, we believe the law should require that commercial freight forwarders be independent of the shippers they serve. Under current law, as a result of an amendment adopted in the Budget Reconciliation Act (PL 97-35), shippers and importers may act as forwarders for others. This offers two major hazards, i.e., smaller independent forwarders probably will suffer loss of business if they must compete against major companies with a "captive" base of cargo. The shipping public in many parts of the country may well lose the services of independent forwarders. Potentially, conflicts may arise in providing service to shippers. For example, during peak shipping periods when space in vessels is in short supply, will the forwarder tend to favor his own cargo as against that tendered by the separate customer shipper?

We have offered detailed suggestions to the subcommittee staff, and are prepared to render whatever further assistance is necessary.

Sincerely,

RICHARD D. FORD, *Executive Director.*

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Washington, D.C., November 11, 1981.

Hon. SLADE GORTON,
Chairman, Merchant Marine Subcommittee, Committee on Commerce, Science, and Transportation, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is to express our views on several provisions of S. 1593, the Shipping Act of 1981. While this legislation, along with S. 125, seeks to revise regulation of the maritime industry, we find that the trucking industry would be impacted significantly in at least two areas.

As it presently stands, S. 1593 and S. 125 differ on the treatment of "maritime labor agreements" as it pertains to the Federal Maritime Commission's jurisdiction over such agreements. Section 3(1) of S. 1593 does not contain any definition of this term, while section 102(15) of S. 125 does. Thus, a real problem is posed surrounding the continued vitality of section 45 of the Shipping Act of 1916, adopted by Congress last year in the Maritime Labor Agreements Act of 1980 (P.L. 96-325) (MLAA). See 46 U.S.C. §842. We are also aware of the positions taken before this Subcommittee on this matter by the Commission and the International Longshoremen's Association.

American Trucking Associations, Inc. believes it is imperative that the Federal Maritime Commission retain jurisdiction over certain provisions in labor agreements in order to protect the shipping public, including motor carriers, from all forms of discrimination. Despite contrary opinions voiced by the Longshoremen,[1] the above objective was clearly codified in the MLAA. We strongly urge complete retention of those provisions, including the current definition of "maritime labor agreement" contained in 46 U.S.C. §801.

Therefore, we oppose the change to that definition urged by the ILA, and apparently supported by the FMC. The motor carrier industry is entitled to all the protections provided in the Shipping Act and the Intercoastal Shipping Act of 1933. This is so even if the "rates, charges, regulations, or practices [of a common carrier by water or other person subject to FMC jurisdiction] arise out of, or are otherwise related to a maritime labor agreement." 46 U.S.C. §842 (material in brackets added). This Subcommittee should reject any course of action which is inconsistent with the MLAA.

The second major concern which the motor carrier industry has with S. 1593 is with those provisions establishing jurisdiction in the FMC over joint intermodal rates filed by ocean common carriers and either motor, air, or rail carriers. Section 4(b)(2) of S. 1593 authorizes ocean common carriers to establish joint through routes and rates with any other mode of carrier. Elsewhere, section 12(a)(4) gives the FMC authority to prohibit "unreasonably high or low" rates filed by ocean carriers.[2] Together, more than tariff filing requirements emerge.

In short, as we read the bill, the motor carrier portion of jointly established rates would become subject to FMC approval as part of the overall rate, even though those motor carrier rates would also be cleared subject to ICC jurisdiction. The potential thus exists for the FMC to find a particular joint rate unlawful in spite of the ICC's approval of the motor carrier's identifical rate for the inland movement, or vice versa.

We urge this Subcommittee to avoid creating a situation of dual jurisdiction. Although FMC Chairman Green, in his statement before the Subcommittee on September 21, 1981 (p. 8), acknowledged the same concern, the Commission's proposed modification of section 4(b)—to limit joint rates with inland carriers only to those negotiated on an individual basis rather than collectively—does not eliminate concurrent jurisdiction. The ICC would still retain its full jurisdiction under the Interstate Commerce Act.

The difficulties caused by concurrent jurisdiction being vested in the FMC and ICC have been recognized by the trucking industry for many years. Since February 1973, the ATA Executive Committee has been on record as favoring the creation of a joint board between those two agencies which would have joint jurisdiction over the through routes and rates involved in intermodal transportation.[3] Providing for a joint board would be an easy mechanism by which Congress could resolve our concerns.

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[1] Statement of Thomas W. Gleason, President, International Longshoremen's Association, September 24, 1981, pp. 12-18. The motor carrier industry, through ATA, has been active in all litigation of the so-called "Rules on Containers." The clear language of section 45 and its legislative history refute the ILA's contention that "[w]e in the industry were left with the firm impression that the new law [MLAA] would prohibit regulation of collective bargaining by the FMC, period!" Statement, p. 11. See Report on Committee Consideration, reprinted in 7 U.S. Code Cong. & Admin. News, pp. 4504, 4508 (Sept. 1980 Supplement).

[2] Indeed, motor carriers establishing joint rates with "controlled ocean carriers," as defined in section 3(7), would have those rates even more heavily scrutinized by the FMC pursuant to section 10.

The trucking industry recommends the joint board concept as strongly today. Motor carriers engaging in intermodal operations with ocean carriers or other modes would be able to enjoy a simplified, one-time approval procedures whereby joint rates could be established without the need for two or more agency proceedings. Obviously, the possibility of conflicting decisions is therey eliminated. Importantly, economics in government would be achieved by avoiding an extra layer of administrative procedure.

At the same time, section 8(b) should be changed to reflect equal antitrust immunity for every mode when participating in intermodal activities of the type contemplated in the bill. This modification, together with the joint board concept, is in keeping with the goals and objectives which you enunciated in sponsoring S. 1593, namely, to place U.S. commercial interests on an equal footing with foreign ocean carriers and to advance intermodal transportation opportunities.

The trucking industry, therefore, asks that our concerns expressed in this letter be considered by the Subcommittee and that this letter be made a part of the hearing record on S. 1593.

Sincerely,

BENNETT C. WHITLOCK, Jr., *President.*

INTERNATIONAL SHIPPING TRUSTEES INC.,
New York, N.Y., November 17, 1981.

Senator SLADE GORDON,
Senate Commerce Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR: I.S.T. is a neutral body involved in policing both American and foreign to foreign trades. As such, we have an obvious interest in regulatory changes affecting ocean shipping.

We have read, therefore, with concern the submission to your Subcommittee of Mr. Harry de Venoge, the General Counsel of The Adherence Group Inc.

In the first place it appears to us that the seven pages are little more than sales pitch for a monopolistic neutral body system, largely to the benefit of The Adherence Group.

Secondly, it is apparent that the proposal is nothing less than a way for Conference interests in a trade to have the Conferences' own watching mechanism supervising the non-Conference lines.

Thirdly, and more importantly, we detect a fundamental fault in the argument. The submission seeks to force the majority to bend to the minority—it fails to appreciate that the Shipping Act was, in part, introduced to legalize Conferences that were otherwise in violation of law. The policing of Conferences was specifically required to ensure that Conferences met their obligations. Non-Conference lines do not have the same obligations.

That the Non-Conference lines (surely a better description than "independents" or "outsiders") do not seek immunity from the Anti-Trust laws must place them as equals alongside the vast majority of U.S. companies. To suggest that this entirely normal pose gives them "free license to malpractice" is impertinent in its suggestiveness.

Two other points in the submission also deserve attention.

We believe the reference to access to foreign-based records of foreign independents to be naive. Where lines agree to allow third parties access to their records they do so on an entirely voluntary basis, and the findings remain totally confidential. Within this voluntary framework the knowledge gained by the neutral body would be of no value to the Federal Maritime Commission in its role of monitoring the requirements of the Shipping Act.

There is a suggestion that the cost element is a factor. We act for both Conference and non-Conference lines, and we have not found cost to be an "obstacle", but then, we don't have a General Counsel's overheads to meet.

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[3] A truly intermodal joint board approach would also include the Civil Aeronautics Board. However, it is unclear at this time whether anyone will succeed that agency in the rate functions corresponding to those reserved to the FMC and ICC.

Finally, I note that you yourself asked Mr. de Venoge what independence his proposal would leave for the independent. This is the hub of the matter we submit, but in parenthesis one might like to ask quis custodiet ipsos custodes?

Yours truly,

Dennis F. Foot, *President*.

Interstate Commerce Commission
and the Federal Maritime Commission,
Washington, D.C., November 20, 1981.

Hon. Slade Gorton,
Chairman, Subcommittee on Merchant Marine, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: We are writing to clarify the respective positions of the Federal Maritime Commission (FMC) and the Interstate Commerce Commission (ICC), regarding S. 1593, "The Shipping Act of 1981," and its probable impact on intermodal transportation. Since both of our agencies share a commitment to create an environment conducive to intermodalism and similar commercial innovations, we are cooperating closely in identifying potential areas of statutory conflict and other issues of concern.

With this purpose in mind, our agencies have conferred in an effort to pinpoint and solve any potential interagency problem areas in S. 1593. Our joint comments which follow are the result of this consultation process, and we believe that they constitute a reasonable approach to issues of common concern. The Commissioners of both agencies have reviewed this letter and fully endorse the views expressed herein.

One area of shared concern involves the impact a grant of antitrust immunity to ocean carrier conferences would have on inland surface carriers. Both the FMC and the ICC agree that this antitrust immunity would not extend to carriers regulated by the ICC. In addition, both agencies agree that the members of such a conference must negotiate rate divisions individually with inland carriers.[1] The Federal Maritime Commission's September 21, 1981, statement before your Subcommittee expressed this view by recommending that ". . . any language dealing with intermodal agreements should specify that negotiations with inland carriers subject to the regulation of the Interstate Commerce Commission must be undertaken by individual ocean carriers."

The ICC concurs there should be specific language indicating that ocean carrier conference members will individually negotiate intermodal through rate divisions with inland carriers. While the FMC proposed modifications to section 4 of S. 1593 in order to clarify conference intermodal rate-setting authority, these changes did not include language specifying that conference antitrust immunity should not extend to rate negotiations with inland carriers. Both agencies now agree that this limitation should be included in the specific language of the bill.

Another area of concern to our agencies involves tariff publication of joint through intermodal rates covering international liner movements. The ICC is concerned with any ocean carrier tariff filing requirement which might have the effect of revealing a rail rate division. This concern stems from the ICC's February 19, 1981 decision in Ex Parte No. 230 (Sub-No. 5), Improvement of TOFC/COFC Regulations, to exempt rail carriers from filing tariffs covering trailer-on-flatcar (TOFC) or container-on-flatcar (COFC) movements. The purpose of the exemption is to encourage competition and flexibility in the setting of rail rates covering these movements. The ICC is concerned that this intent could be thwarted if rail divisions of intermodal through rates are revealed in ocean carriers' tariffs. This result would occur if ocean carriers are required to publish both their through rate and the ocean divisions of those rates.

The FMC and the ICC suggest the following language for inclusion in the tariff filing requirements of section 9(a) in order to preclude this possible problem:

"Except with regard to bulk cargo and softwood lumber, every ocean common carrier, conference of carriers, and nonvessel operating common carrier shall file with the Commission, and keep open to public inspection, tariffs showing all its rates, rules, regulations and practices, between all points or ports on its own route and on any through transportation route which has been established.

"Notwithstanding the preceding sentence or any other requirement of this section, ocean common carriers shall not be required to state separately or otherwise reveal in tariff filings the inland divisions of a joint through intermodal rate."

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[1] The ICC takes no position on whether ocean conferences should have authority to set a through intermodal rate. The FMC has taken a strong position in support of such authority in its testimony on S. 1593.

This language resolves the ICC's concern, since ocean carriers will not be required to publish ocean divisions of through intermodal rates. The ocean carrier would publish only its through rate, and the rail division of this rate would therefore not be revealed. The FMC would require adherence to the through rate of exercising its jurisdiction solely over the ocean carrier. Neither the ICC nor the FMC believes that S. 1593 should make any change in the existing jurisdictional division of authority between the two agencies.

In reviewing areas of common interest, both agencies agreed upon the need to follow their respective statutory mandates without intruding upon each other's jurisdiction in any way. The statutory language of S. 1593 should make this clear. This sentiment was emphasized in the FMC's September 21st statement to your Subcommittee pointing out that the FMC has no desire to expand its jurisdiction to include or affect the activities of carriers regulated by the ICC. Both agencies are committed to exercising the minimum regulation necessary to preserve efficient commerce and healthy competition.

We hope that our comments regarding these areas of joint concern will be helpful to the Subcommittee. If there are any further questions about these issues or any other issues, we would be happy to answer them.

ALAN GREEN, JR.,
Chairman, Federal Maritime Commission.

REESE H. TAYLOR, JR.,
Chairman, Interstate Commerce Commission.

ASSOCIATION OF SHIP BROKERS AND AGENTS (U.S.A.) INC.,
New York, N.Y., November 24, 1981.

Hon. SLADE GORTON,
Chairman, Merchant Marine and Tourism Subcommittee, Committee on Commerce, Science and Transportation, Washington, D.C.

DEAR SENATOR GORTON: Our Association wishes to state its strong objection to proposed Section 11(c)(3) of S. 1593. That section provides as follows: "An ocean common carrier shall not pay compensation as provided in this subsection to its agents or any other ocean common carrier or its agents."

This provision would drastically change the law and would, without any justification, destroy business relationships which have existed since long prior to passage of the 1961 Freight Forwarder Act and which were confirmed by Congress during its deliberations preceding that Act. We can think of no reason an agent should be denied compensation for either his agency services, or for services rendered in his freight forwarding capacity when an agent acts as a licensed freight forwarder. Still less is there any reason the federal government should intervene in, indeed destroy, the normal business relationships between carriers and their agents or between carriers and forwarders who happen also to be agents. This above all seems to us to be an area in which the forces of the marketplace should be permitted to continue to operate, free of federal intervention.

We respectfully urge the Committee to delete proposed Section 11(c)(3) from any bill which it may approve. We very much appreciate your consideration.

Very truly yours,

D. C. COLESWORTHY, JR.,
Executive Director.

[The following information was referred to on pp. 123 and 128.]

FEDERAL MARITIME COMMISSION,
Washington, D.C., December 11, 1981.

Hon. SLADE GORTON,
Hon. DANIEL K. INOUYE,
*Subcommittee on Merchant Marine,
U.S. Senate, Washington, D.C.*

DEAR SENATORS GORTON AND INOUYE: Enclosed are the responses to certain questions posed to the Commission during my appearance before the Subcommittee to testify concerning legislation to reform the Shipping Act, 1916. We would also like to take this opportunity to respond to a matter raised by a letter filed with the Subcommittee which was forwarded to the Commission and also to an informal inquiry made to the Commission by Subcommittee counsel. This should complete the hearing record regarding the FMC's testimony.

If you have any questions concerning our response, or if we may be of assistance with regard to any other matter, please do not hesitate to contact me.

Sincerely,

ALAN GREEN, JR., *Chairman.*

Enclosure.

Question 1. [page 123.] Senator Gorton: Please give examples of situations requiring cancellation of agreements already in effect by the Commission now?

Answer. Pursuant to section 15 of the Shipping Act, 1916, the Commission has the authority to approve, disapprove, cancel or modify an agreement. The Commission (and, by delegation, the Director of the Bureau of Agreements) may cancel a previously approved agreement, either at the request of the parties or upon its own initiative, when the subject agreement is no longer a viable working arrangement between or among the member parties. In other words, if the agreement only exists on paper and is, in effect, a defunct agreement, the Commission will cancel the agreement. This is a fairly common occurrence and is accomplished with little or no controversy.

The following information has been provided by the Commission's Bureau of Agreements:

With respect to agreement cancellations for the period November 1, 1980 through October 31, 1981, our records indicate that 53 agreements were cancelled by the Commission. All of these agreements were cancelled by request of the parties thereto, either on their own motion or upon inquiry from the Commission's staff.

Our records do not indicate temporary lapses of agreements or possibly a few agreements which were not extended beyond their expiration date because of the failure of the parties to request an extension or for the Commission to favorably act upon a requested extension.

Question 2. [p. 128.] Senator Inouye. Could you have someone look into the laws of the United States to determine if, in fact, laws are equally applied to domestic and foreign interests . . . We won't need a very in-depth study, but I think the record should show if, in fact, there are differences in the applicable of our laws as they concern foreign and domestic interests . . .

Answer. In conversations with Subcommittee counsel subsequent to our testimony, we were informed that the primary interest of the Subcommittee in reference to this question is in how the laws administered by this agency have been enforced and in whether there is a noticeable difference in the opposition of the Department of Justice to agreements among U.S. carriers as opposed to their foreign competitors. In the time available, therefore, we have addressed those questions, but would be happy to pursue the broader question if the Subcommittee desires us to do so.

We can assure you is that the Commission, within its own regulatory sphere, makes every effort to administer the Shipping Act, 1916 and related statutes in as even-handed and non-partial manner as possible. As you know, it is not our mission to promote the U.S.-flag merchant marine, but neither is it our intent or practice to disadvantage the U.S. companies and persons subject to our jurisdiction vis-a-vis their foreign counterparts

Relevant to the Commission's enforcement (penalty collection) activities for violations of the Shipping Act, our Bureau of Hearings and Field Operations has compiled the following statistics:

Flag	Number of carriers	Total penalties
U.S.	15	[1] $5,303,500
Foreign	50	10,345,500

[1] This includes the much-publicized $4,000,000 settlement with Sea-Land Service, Inc. in 1976.

These figures represent all carriers who, from January 1, 1977 to date, have been assessed, or who have agreed to pay, civil penalties for any violations.[1] They do not include shippers, freight forwarders, etc. Most of the violations for which penalties were determined occurred before the statutory penalties were increased in 1979.

Subcommittee counsel also expressed an interest in how often the Department of Justice protests a section 15 agreement filed for approval and, of those agreements protested, how many involve U.S. entities and how many involve foreign interests. The Commission's Bureau of Agreements provided the following statistics:

Our records indicate that during the period November 1, 1980 through October 31, 1981, 173 agreements were filed with this Bureau. (This number excludes terminal agreements which are rarely, if ever, protested). Of the 173 agreements filed, two were protested by the Department of Justice and both of those involved a combination of U.S. and foreign flag parties.

Our records also indicate that during fiscal years 1979 through 1981 final action was taken by the Commission with respect to 597 agreements. Of these, 98 were protested. Of these protests, 18 were filed by the Department of Justice and all 18 involved a combination of U.S. and foreign flag parties.

While the statistics such as the above may be compiled by the Commission's staff, we caution against drawing any firm conclusions from this data since they do not reflect the basis for a protest.

Question 3. [p. 128.] "Senator Inouye: Mr. Chairman, I've listened to your statement very carefully and I note that you have responded to just about every problem, but I'm not quite clear on one. Open and closed conferences; what are your thoughts there? One bill, 125, has an open-conference system. The other [S. 1593] has a closed conference system. Which do you prefer?"

Answer. The question is a difficult one to answer since neither bill provides for closed conferences as that term is commonly understood. The term "closed conference" applies generally to any conference in which member lines may bar outsiders from membership. On the other end of the spectrum there are "open" conferences which must accept any and all carriers operating in the trade. Members are free within monetary restraints to come and go at will. Open conferences, which are the only type which are permitted in U.S. foreign trades, generally exercise far less market power. However, the degree of market power exercised by a conference depends not so much on whether the conference is open or closed, but rather on other factors by which the conference can control the cargo in a trade. For example, foreign carriers often have corporate ties to major shipping interests. Japan is a classic example of this, with its trading companies, of which ocean carriers are "family members." In addition, foreign-to-foreign conferences have been uninhibited by antitrust laws in implementing strong tying devices, such as the deferred rebate system, and in "rationalizing" their services to improve utilization of ships and equipment. Such rationalization generally includes coordinated sailing schedules, terminal sharing, space chartering and, perhaps cargo and revenue pooling. Once such conferences have achieved strength through such devices, the ability to limit membership then has some meaning in terms of combatting overtonnaging, since carriers find it difficult to compete as independents with such a strong conference.

Moreover, there are presently no strong "trading companies" or parallel entities in the U.S. through which national-flag carriers can control large volumes of cargo and thus have a strong base from which to dominate a trade. Thus, the limited membership provision of S. 1593 alone would not, in our opinion, lead to the type of closed conference that has traditionally existed in foreign-to-foreign trades. In fact, we doubt that U.S. conferences would opt to close their membership unless they had other devices available to them under which they could largely control trade cargo in the first instance. In recent years, U.S. conferences have been trying hard to recruit new members, or in some cases, trying harder to retain old ones.

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[1] Since some of the settlement agreements provide for installment payments, not all of the money has yet been collected.

The decision to limit the strength of conferences in the U.S. trades was based on our traditional distrust of cartels. According to conventional antitrust theory, the opportunity for increased competition which occurs under the U.S. conference system should result in ocean freight rates which are lower than those available under a strong conference system.

Virtually all of our trading partners, lacking our distrust of cartels, have opted for a strong closed conference system. They believe that fully rationalized service is more cost efficient because the carriers achieve a higher utilization than would otherwise be possible. This, it is said, results in better service at lower rate for the shipping public.

It is extremely difficult, if not impossible, to compare the efficiencies of closed versus open conferences through an empirical study. The level of freight rates is influenced by a myriad of factors which vary from commodity-to-commodity and from trade-to-trade. The degree to which one factor affects the overall level of rates cannot be isolated with any degree of accuracy. Thus, a comparison of the rates of a trade having a strong conference with the rates of a trade having a weak conference is of limited value. Not surprisingly, the results of studies which have been conducted to date vary with the trades being compared.

In the absence of a definitive empirical study, it would appear that, ultimately, the decision to have open or closed conferences must turn on the strength of our philosophical convictions which take into account various foreign policy and trade policy considerations. Viewing the matter from our position as regulators of the U.S. foreign commerce, the Commission has no information that persuades it that either open or closed conferences are panaceas in themselves. In fact, the Commission's experience with the diverse needs and problems of various trades leads us to believe that different approaches should be tailored to maximize efficiency in each individual trade. We therefore endorse a commercial and regulatory regime which permits maximum flexibility to accommodate widely divergent situations in the U.S. foreign commerce.

Question 4. The Commission received a copy of a comment filed with the Commerce Committee by the law firm of Graham & James which asks the Committee, in its current legislative review of the Shipping Act, to reconsider the assessment authority granted to the FMC by P.L. 96–25, the anti-rebating law. We would like to take this opportunity to comment on that subject.

Answer. P.L. 96–25 amended section 32 of the Shipping Act, 1916 by adding a new subsection which provides that ". . . the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however,* That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred." In both the House and Senate reports on the bill, the reasons for including such authority were provided:

"Problems of enforcing the rebating provisions of the Act have often arisen when a party refused to compromise a penalty with the FMC and an action had to be instituted in U.S. District Court for collection of the penalty. First, the FMC is required in these actions to be represented by the Department of Justice adding another level of review to the files of the case and an inevitable delay. Second, and more significant, some courts have been unimpressed by the seriousness of rebating violations and tended to award nominal penalties for the violations that are proved in court. . . . The Committee believes that this power, which has previously been granted to other agencies, most notably the Occupational Safety and Health Administration, will not only expedite the formal assessment of penalties and eliminate the existing likelihood of inconsistent treatment, varying on the basis of the particular U.S. District Court in which the action is brought, but will assist the FMC in compromising penalties before trial." S. Rpt. No. 96-147, 96th Cong., 1st Sess. (1979) at 19. See also, H.R. Rept. No. 96-232, 96th Cong., 1st Sess. (1979) at 16–17 and S. Rpt. No. 95–966, 95th Cong., 2d Sess. (1978) at 26.

Assessment authority pursuant to section 32 of the Shipping Act has worked well over the last two years. The advantages to having the compromise and assessment authority repose in the FMC include the following:

The Commission, rather than the District Court, can toll the statute of limitations. Where negotiations for settlement run into the expiration of the statute of limitations period, a case can be instituted by the FMC and the same negotiations between the same people can continue;

Cases are disposed of much more quickly at the FMC than they would be in District Court; and

The amounts of civil penalties collected for a particular violation will tend to be more uniform if "controlled" by the same attorneys, i.e., in both compromise and assessment proceedings.

This authority is not unique to the FMC. The Administrative Conference of the United States recommends that assessment authority be granted to administrative agencies. *See* 1 C.F.R. 305.72-6 and also 1 C.F.R. 305.79-3 (copies attached). As of May, 1979, 141 (41 percent of the 348 civil penalty statutes expressly conferred assessment authority on administrative agencies.[2]

The Commission thus strongly believes and recommends that the assessment authority granted P.L. 96-25 should be maintained by the current legislation now under consideration by the Committee.

Question 5. Will actions similar to that of the Commission in instituting the rulemaking proceeding in Docket 81-54 to amend its tariff filing regulations to specifically provide for the filing of time/volume rates, be precluded by the provision in S. 1593?

Answer. The rulemaking proceeding which proposes to amend 46 C.F.R. Part 536 (G.O. 13) to establish specific regulations for the filing of time/volume rates in the U.S. foreign commerce was instituted by the Commission pursuant to sections 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b) & 841(a)) and section 4 of the APA (5 U.S.C. 553). The Commission initially proposed to prohibit such time/volume rates (notice of August 27, 1980, F.R. at pp. 57152-57153) but, upon consideration of the public comments filed on the rule, the majority of which did not support a total ban on such rates, the Commission issued a second notice of proposed rulemaking on November 2, 1981 (46 F.R. 54390-54391). The current proposal would amend section 536.2 of the Commission's regulations to allow for the filing of time/volume rates under certain conditions, *e.g.*, that time/volume contracts and tariffs specifically set forth provisions pertaining to publication, accessibility, surcharges, disabling occurrences and deficit accountability. The proposed rule would also require that shipping records must be maintained and made available in the U.S. to support the validity of final rate applications. Comments on the proposed rule are due January 4, 1982.

The tariff provisions of Section 9 of S. 1593 are similar to the tariff requirements of section 18(b) (with a few exceptions not relevant for purposes of this question). In addition, the Commission's general rulemaking authority for regulation of the U.S. foreign commerce is included in section 18 of S. 1593. It thus appears that, because S. 1593 continues the tariff filing and general rulemaking authority of the Commission as it affects the U.S. foreign commerce, the bill would not affect the Commission's ability to conduct a rulemaking similar to that of Docket 81-54, if the rule is effective for the foreign commerce only.

Under S. 1593, as currently drafted, the Commission would not, however, be able to conduct a similar rulemaking for cargo traffic moving in the domestic offshore commerce trades. Section 19(a) of S. 1593 eliminates the Commission's general rulemaking authority for the domestic offshore trades by repealing section 43 of the Shipping Act, 1916. We make specific mention of this provision since the proposed repeal may have been unintentional. We believe that the Commission's rulemaking authority for the domestic trades is no less important than that for the foreign commerce and should be maintained. The Commission therefore strongly recommends that section 19(a) of S. 1593 be amended by deleting "section 43" from the list of sections of the Shipping Act to be repealed.

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[2] Departments of Agriculture, Commerce, Energy, Interior, Labor, State, Transportation, Treasury and CAB, CFTC, CPSC, EPA, FCC, FDIC, FHLBB, FRB, FSLIC, FTC, NCUA, NRC and USPS. See the final report to the Administrative Conference of the U.S. in May, 1979 entitled "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies." The FMC is not included in the tabulation because it did not then have the authority. The ICC also now has a degree of assessment authority. See 49 U.S.C. 1901(i)(2).